(24,674)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 435.

ATLANTIC CITY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LEWIS S. H. PARKER.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

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a New Jersey Court of Errors and Appeals, November Term, 1914.

No. —.

LEWIS S. H. PARKER, Plaintiff-Respondent,
vs.
ATLANTIC CITY RAILROAD CO., Defendant-Appellant.

Appeal from Supreme Court.

State of the Case.

FRENCH & RICHARDS,
Attorneys for Appellant.
DAVID O. WATKINS,
Attorney for Respondent.

1 *Notice of Appeal.*

New Jersey Supreme Court.

Action at Law.

LEWIS S. H. PARKER
vs.
ATLANTIC CITY RAILROAD COMPANY.

Notice of Appeal.

To David O. Watkins, Esq., Attorney of Plaintiff:

Take notice that the defendant appeals to the Court of Errors and Appeals in the last resort in all causes as heretofore from the whole of the judgment entered in this cause on the following grounds:

1. The trial Court refused defendant's motion for a non-suit.

2. The trial Court refused the motion made on behalf of the defendant to direct a verdict for the defendant.

3. The trial Court charged the jury: "The couplers were intended to couple automatically by impact, but they did not couple in this instance, and in order to make them couple plaintiff was required to fix them with his hands so they would couple."

2 4. The trial Court charged the jury: "If you find that the couplers were not couplers coupling automatically by impact, which could be coupled without the necessity of men going between the ends of the cars, then the matter of contributory negligence will have nothing to do with the case; that feature of the case must be eliminated altogether; if the couplers were not the kind of couplers called for by this law, then you cannot take into consideration the

question of the plaintiff's contributory negligence, because it wouldn't have anything to do with the case. The defendant in that event would have to pay all the damages. But if you find, upon the other hand, that the couplers were the kind of couplers called for by the law which I read to you, then you will have to consider the plaintiff's contributory negligence seriously."

5. The trial Court left the undisputed question of whether the couplers with which the cars were equipped would couple automatically by impact to the jury.

6. The trial Court refused defendant's sixth request to charge which was as follows: "6. If the jury find that the coupler was such a coupler as would couple automatically by impact and was in order, then the plaintiff assumed the risk of his employment and the verdict must be for the the defendant."

7. The trial Court charged the jury: "I refuse to charge that, gentlemen, and submit that proposition to you as a jury question. That is for the jury to determine, but I have already stated, however, that in the matter of the assumption of risk of course anything
3 that was obvious to the plaintiff, that he might reasonably anticipate, was a risk that he assumed, providing the couplers were the sort of couplers, the character of couplers contemplated by the Act of Congress."

8. The trial Court refused defendant's seventh request to charge which was as follows: "7. If the jury find from the evidence that the plaintiff could have reasonably anticipated the result of putting his hand on the coupler while the engine was coming back under signal, it was a risk of his employment known to him which he assumed and the verdict must be for the defendant."

9. The trial Court charged the jury: "That is for you to say, whether or not providing the couplers were the sort of couplers provided for by the Act of Congress the plaintiff did not assume the risk himself, because he was an intelligent man and an experienced man. That, gentlemen, is a question for you to determine under all the facts and circumstances."

10. The trial Court left to the jury to determine the question whether the cars of defendant were equipped with couplers coupling automatically by impact when there was no evidence that they were not so equipped and it appeared from the evidence that they were so equipped.

11. The trial Court left to the jury to determine questions which should properly be determined by the Court.

12. The rulings of the trial Court denied to the defendant
4 rights and immunities to which it was entitled under the Federal Employers' Liability Act.

FRENCH & RICHARDS,
Attorneys for Defendant.

[Endorsed:] Service of within notice of appeal is hereby acknowledged July 13, 1914. David O. Watkins, Att'y for Lewis S. H. Parker. Filed Jul- 13, 1914. Wm. C. Gebhardt, Clerk.

5 *Judgment Record.*

New Jersey Supreme Court.

LEWIS S. H. PARKER
vs.
ATLANTIC CITY RAILROAD COMPANY.

Judgment Record.

David O. Watkins, Attorney.

Atlantic City Railroad Company, the defendant in this cause, was summoned to answer unto Lewis S. H. Parker, the plaintiff therein, in an action at law upon the following complaint:

The plaintiff, Lewis S. H. Parker, of the village of Mullica Hill, in the Township of Harrison, in the County of Gloucester and State of New Jersey, says *that*:

First Count.

1. That on the 16th day of November, 1912, he was employed by the Atlantic City Railroad Company as a brakeman on its certain freight train, to wit: At Williamstown, in the County of Gloucester and State of New Jersey, in interstate commerce and transportation.

2. That at the time and place aforesaid, the plaintiff in
6 the performance of his duty, undertook to couple a locomotive to the said freight cars; that a part of the coupling appliance was defective, to wit: the drawhead on the freight car which plaintiff was attempting to couple to said locomotive so that as the plaintiff undertook to perform his duty in the usual manner, because of the defectiveness in said drawhead and other parts of the said coupling appliances, the said coupling refused to work, whereby and because whereof the plaintiff had his left arm caught and crushed between the said locomotive and car, necessitating the said arm being amputated between the elbow and wrist.

3. That while the plaintiff was endeavoring to perform his duty as aforesaid, other of the defendant's agents in charge of said freight cars and locomotives negligently and carelessly backed the locomotive against said freight cars so suddenly as to catch the plaintiff's left arm between the locomotive and train of cars, thereby crushing the said arm and necessitating same being amputated between the elbow and wrist.

4. That by reason of said injury, plaintiff is permanently injured and incapacitated, and has been caused to expend large sums of money in his efforts to be cured of his injuries, and has suffered great pain of body and mind and will continue to suffer great pain of body and mind so long as he lives.

5. The plaintiff brings this action under the Act of Congress of the United States, entitled "An act relating to the liability of common carriers by railroad to their employees in certain cases," (com-

monly known as "The Federal Employers' Liability Act").
7 Approved April 22nd, 1908, and the amendments thereto and supplements thereof.

Second Count.

1. Paragraph one of the first count herein is hereby repeated.
2. That at the time and place aforesaid, the defendant, being a common carrier, then and there engaged in interstate commerce by railroad, hauled on its line a car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and the said plaintiff, while in the performance of his duty, and while undertaking to perform his duty in the usual manner, to wit: while endeavoring to couple defendant's locomotive to said car, because of said car not being equipped as aforesaid, the plaintiff's left arm was caught between the locomotive and said car, thereby crushing the said arm and necessitating same being amputated between the elbow and wrist.
3. That by reason of said injury, plaintiff is permanently injured and incapacitated, and has been caused to expend large sums of money in his efforts to be cured of his injuries, and has suffered great pain of body and mind and will continue to suffer great pain of body and mind so long as he lives.

Plaintiff demands $20,000 damages.

DAVID O. WATKINS,
Attorney for Plaintiff.

8 Defendant, Atlantic City Railroad Company, a corporation of New Jersey, says that:

Defense to First Count.

1. It admits the first paragraph.
2. It denies the second paragraph.
3. It denies the third paragraph.
4. It denies the fourth paragraph.

4*a*. The engine was in the absolute control of plaintiff and moved or stopped at his command. When the engine was within about three feet of the car, after giving the signal to the engineer to back and without signalling to the engineer to stop, plaintiff put his hand in the coupling with the result that his hand was caught and pinched. The danger was obvious to plaintiff and the risk one that he assumed. The injury was due entirely to plaintiff's wilful negligence. Neither the coupling appliances nor any part thereof were in any degree defective and there was no negligence on the part of defendant.

Defense to Second Count.

1. It admits the first paragraph.
2. It denies the second paragraph.
3. It denies the third paragraph.

3a. The engine was in the absolute control of plaintiff and
9 moved or stopped at his command. When the engine was within about three feet of the car, after giving the signal to the engineer to back and without signalling to the engineer to stop, plaintiff put his hand in the coupling with the result that his hand was caught and pinched. The danger was obvious to plaintiff and the risk one that he assumed. The injury was due entirely to plaintiff's wilful negligence. The car was equipped with couplers coupling automatically by impact and there was no negligence on the part of defendant.

FRENCH & RICHARDS,
Attorneys for Defendant.

This case was tried before Judge Howard Carrow, with a jury, at the Gloucester County Circuit, on June 10th and 11th, 1914.

The jury rendered a general verdict against the defendant, in favor the plaintiff, for three thousand dollars ($3,000).

Whereupon it is adjudged that the plaintiff recover of the defendant the sum of three thousand dollars and his costs which are taxed at —— making in the whole the sum of —— Judgment entered June 18, 1914.

WM. S. GUMMERE, *C. J.*

$3000.00 dmgs.
——— costs

$

10 I, William C. Gebhardt, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twentieth day of June, A. D. nineteen hundred and fourteen.

[SEAL.] WM. C. GEBHARDT, *Clerk.*

11 *Testimony.*

New Jersey Supreme Court, Gloucester County Circuit, May Term, 1914.

LEWIS S. H. PARKER
vs.
ATLANTIC CITY RAILROAD COMPANY.

Action at Law.

Appearances:

For the Plaintiff, David O. Watkins, Esq.
For the Defendant, French & Richards, Esqs.

Before Carrow, J., and a Jury.

12 *The Case for the Plaintiff.*

(Mr. Watkins opens the case for the plaintiff to the jury.)
(Mr. French opens the case for the defendant to the jury.)

LEWIS S. H. PARKER, sworn.

By Mr. Watkins:

Q. Mr. Parker, how old are you?
A. Twenty-six next September.
Q. Where do you live?
A. Mullica Hill, New Jersey.
Q. How long have you lived there?
A. All my life.
Q. Are you married?
A. Yes, sir.
Q. What does your family consist of?
A. My wife and three children.
Q. In November, 1912, were you in the employ of the Atlantic City Railroad Company?
A. Yes, sir.
Q. In what capacity?
A. Extra brakeman.
Q. Brakeman on what?
A. The Mullica Hill shifter.
Q. Running from where to where?
A. Mullica Hill to Williamstown Junction; Williamstown Junction to Mullica Hill.
Q. Now, on that day, November 16, 1912, were you a brakeman on this train?
A. Yes, sir.
Q. Where was the train made up?
13 A. Along the road.
Q. Well, where did the train start from, your train?

A. Mullica Hill.
Q. And you went to where?
A. Williamstown Junction.
Q. Now, then, was there another train made up at Williamstown Junction?
A. Yes.
Q. And where was that train to go?
A. Mullica Hill.
Q. Well, now, when you got to Williamstown—was that between Williamstown Junction and Mullica Hill?
A. Yes, sir.
Q. Was the train disconnected?
A. Yes, sir.
Q. Did you uncouple the train?
A. No, sir.
Q. What was it disconnected for, if you know?
A. For the purpose of setting cars in on the side track.
Q. Now, after these cars were placed on the side track, what became of the engine?
A. Cut off and taken out on the main track, and backed up for the train.
Q. What were you doing when it backed up to couple to the main train?
A. Giving the engineer the signal to back up.
Q. Where were you standing?
A. On the ground.
Q. What were you doing—what were you there for?
A. Facing the engineer, signalling him to back up.
Q. What were you there for? What was your duty, just to signal the engineer?
14 A. To couple the engine to the train.
Q. Now, you gave the engineer the signal to come back, did you?
A. Yes.
Q. About how fast did he run his engine coming back when you gave him the signal?
A. About six miles an hour.
Q. Now, what did you do after you gave him this signal to come back and he was running his engine at about six miles an hour?
A. I glanced around and saw that the engine would not couple, and I slid in to push the drawhead over——
Q. Why wouldn't the engine couple?
A. It wasn't set; the drawhead was not set.
Q. Now, explain what you mean by the drawhead not being set?
A. Why, the drawhead on the tender and the drawhead on the car was not straight, so that they would—when they came together they would couple, they would lock and couple. The drawhead on the car was a little bit to one side, and I went in in order to push the drawhead over so as the engine would couple, when it came back.
Q. Would that have coupled without you did that?
A. No, sir.

Q. Now, could you have stopped the engine after giving that signal from the time that you saw this condition of the drawhead?
A. No, sir.
Q. Was it part of your duty to couple that engine to the car?
A. Yes, sir.
Q. Had you done that before?
A. Yes, sir.
Q. Now, what did you do in order to make it necessary to—
15 or what was necessary on your part to make the drawhead in place to couple with the engine?
A. To move it over toward the——
Q. Well, explain how you moved it over?
A. Moved it over toward the center of the train, of the car, rather, in order to couple up.
Q. Did you notice whether the car when it had been uncoupled was left on a curve or not?
A. Not at that time; no, sir.
Q. When did you notice that?
A. Just before the engine coupled.
Q. Now, what effect does it have on the coupling apparatus when the car is left on a curve?
A. Why, it is apt to throw it out either one way or the other, that is, from the center of the car.
Q. And does that interfere with the coupling of the engine to it?
A. Yes, sir.
Q. You had nothing to do with the uncoupling of the train, as I understand it?
A. No, sir.
Q. Now, your arm was caught, and what was the result of that?

The Court: What does he say? Did he know that the train to which the engine was to be coupled was upon a curve?
Mr. Watkins: Just at the time of the accident.

Q. Did you know it before?
A. I didn't notice it; no, sir.
(Former question repeated.)
A. An operation.
16 Q. How was it caught first, how was it caught?
A. Caught in between the knuckles.
Q. The knuckles of what?
A. The knuckle on the tender and the knuckle on the car.
Q. Can you just take your arm and show us the position in which you were working at the time that the engine caught your arm?
A. I was pushing on it this way, and just before the engine coupled it slipped and dropped down, and the knuckles came together and caught me in here.
Q. You were then taken to the hospital?
A. Yes.
Q. Where?
A. Jefferson, Philadelphia.
Q. And what was done to your arm there?

A. They operated on it and a week following they amputated.
Q. How long were you in the hospital?
A. Three weeks.
Q. Any pains from your arm?
A. Yes, sir.
Q. After the three weeks were up, where did you go?
A. Home.
Q. And how long were you home before you did anything?
A. Six months.
Q. What were you earning at the time from the Railroad Company?
A. Anywhere from $3.20 to $4.00 a day.
Q. What business are you in now?
A. I keep a sort of restaurant.
Q. In that business are you compelled to be at any extra expense by reason of not being able to use your arm?
17 A. Yes, sir.
Q. What is this extra expense?
A. Twelve dollars, about.
Q. What is it for?
A. Why, for the purpose of doing business.
Q. Well, is it a license that you pay for doing business, a man that you hire or what?
A. No, it is for help, hired help.
Q. Is that help that you would not have to have if you had your arm?
A. Yes, sir.
Q. Now, do you pay anything other than the $10 a week or $12?
A. No, sir.
Q. Now, since you came home from the hospital, have you had any other operations on your arm?
A. Yes.
Q. Who performed them?
A. Dr. Klopp, of Jefferson Hospital and Dr. Chalfonte, of Mullica Hill.
Q. When was the last operation on the arm?
A. Last month.
Q. Last month?
A. Yes.
Q. Who performed that?
A. Dr. Chalfonte.
Q. And what was that operation?
A. For the purpose of removing bone.
Q. Anything else?
A. No, sir.
Q. Is that painful?
A. Yes.
Q. Do you still suffer from your arm?
A. Yes.
Q. In what way?

A. Why, in lowering or raising the arm, the coat sleeve binds and seems to rub it and makes it sore.

18 Q. Has your arm healed?

A. Not entirely.

Q. Now, between the time you left the hospital and this operation in May last, were there other operations to your arm?

A. Yes.

Q. How many?

A. Five or six.

Q. And what were those operations?

A. Well, some of them were for the purpose of getting the pus and stuff out of the arm, and the others were for the purpose of removing bone.

Q. During these six months, did you suffer any pain from your arm?

A. All the time; yes, sir; I suffered.

Q. And you still suffer, you say?

A. Yes.

Q. Now, did you suffer from pain in any other part of your body?

A. No, sir.

Q. How did you sleep after the injury?

A. Only about half.

Q. How long did that condition continue?

A. About two months from the time of the accident up until I got my right sleep.

Q. How do you sleep now?

A. Fine.

Q. You are all right that way?

A. Yes, sir.

Q. Mr. Parker, how long was it—I don't know whether I asked you that, I think I did—how long was it after this injury that you were unable to do any work?

A. Six months.

Q. And at that time did you go into this restaurant business?

19 A. Yes, sir.

Q. What physicians did you have beside Dr. Klopp at the hospital?

A. Dr. Fisler and Dr. Black at Williamstown.

Q. And Dr. Chalfonte?

A. Dr. Chalfonte, Mullica Hill.

Q. And what has been your physicians' bills, so far?

A. One hundred and five dollars.

Cross-examination.

By Mr. French:

Q. What does this man—is it a man that you employ at twelve dollars a week or twelve dollars a month?

A. Yes, sir, twelve dollars a week.

Q. Is it a man?

A. Yes.
Q. What does he do?
A. Works for me—clerk.
Q. What work does he do?
A. He clerks, does everything there is to do.
Q. That is, keeps books?
A. No, just a common clerk.
Q. What actually does he do?
A. Why, he waits on the customers when they come in, opens oysters, makes stews.
Q. He does the general work around the restaurant?
A. Yes.
Q. And he is the help that you employ?
A. Yes.
Q. Do you take the money?
A. Yes.
Q. Then that twelve dollars a week is part of the expense of running the restaurant, isn't it?
A. Well, it is his wages.
Q. When this train was made up at Williamstown Junction to go toward Mullica Hill, did you assist in making it up or was it made up for you?
A. No, I assisted.
Q. Do you recollect the car that the tender of the engine was being coupled to at Williamstown?
A. I do not.
Q. Don't know the number of the car or its name?
A. No, sir.
Q. And you don't know whether you helped couple up or uncouple that car at Williamstown Junction?
A. I don't remember about that; no, sir.
Q. You don't remember whether you coupled any car to that car at Williamstown Junction?
A. No, sir.
Q. When you left Williamstown Junction that car was the third car from the engine, wasn't it?
A. I don't remember about that.
Q. Weren't there two cars, empties, next to the engine that were put off at Radix?
A. There might have been.
Q. And then the next car was this car that was kicked off at Williamstown, wasn't it?
A. I don't remember how many cars were cut off.
Q. You don't remember whether there was more than one car that was put off at Williamstown?
A. There was more than one, but I don't remember which car this was; no, sir.
Q. And when the engine took the car and put it off—a car or cars as it may have been—at Williamstown, it left some cars standing on the track?
A. Yes.

Q. And the engine took the cars which were to be taken
21 out of the train ahead, beyond the end of the switch, didn't it?
A. Yes.

Q. And then ran the cars that were to be put off back on the switch, leaving the engine standing out on the main track—that was the way the movement was made, wasn't it?

A. The engine laid on the side track with the cars.

Q. Then came out again?

A. Then came out again.

Q. Did you have anything to do with that movement of putting the cars on the side track?

A. No, sir.

Q. Did you remain with this car that was at the head of the train?

A. No, sir.

Q. Where did you go?

A. I went over there to the siding.

Q. With these cars that were cut off?

A. I was over there; yes, sir.

Q. And did you have anything to do with putting them on the siding?

A. I might have given the signal, something like that to back up, yes.

Q. And how did you get back to the car that was then at the head of the train, walk?

A. Walked across to it; yes, sir.

Q. You didn't go back on the engine?

A. No, sir.

Q. On the engine there was an engineer and fireman, was there not?

A. Yes, sir.

Q. And to the engine was the ordinary tank or tender?
A. Yes, sir.

Q. And that tank was to be coupled up to this car that was
22 at the head of the train that was standing on the track?

A. Yes, sir.

Q. The curve there, if there was any, was so slight you didn't notice it at first, wasn't it?

A. I did not notice it; no, sir.

Q. It was a very slight curve, wasn't it?

A. Yes, sir.

Q. When did you give the engineer the signal to come back?

A. When?

Q. Yes.

A. I don't just remember when I started to give him the signal.

The Court: I want you to state how it was; state again how it was that the tender—you call it the tender—and the car would not meet in the coupling process; what was wrong about it?

The Witness: The drawhead on the car was pushed to one side so that it was not straight with the drawhead on the tender; it would not couple.

By the Court:

Q. Well, what caused it to be pushed to one side?
A. The curve, I suppose.

By Mr. French:

Q. You are not certain just when you gave the signal to come back?
A. No, sir.
Q. And you first noticed that these couplers were not in line as the engine was coming back?
23 A. Yes, sir.
Q. The coupler itself is part of what, the drawbar or the drawhead, isn't it?
A. Yes.
Q. That has a coupling attachment?
A. Yes.
Q. And that drawbar runs in under the car floor and works on a pin or something so that it has a lateral movement from side to side?
A. Yes.
Q. Slight, not very much, is it?
A. Why, quite a little, some of them.
Q. Two or three inches or something of that kind?
A. More than that.
Q. Well, there is a movement from side to side?
A. Yes.
Q. And if the train is very much on a curve or if some one has pushed them to one side, the couplers do not meet?
A. No.
Q. But if they do meet, they automatically couple, don't they?
A. Yes, sir.
Q. Do you know what kind of coupler was on the car, the make of coupler?
A. No, sir.
Q. There are a great many different makes of couplers, aren't there?
A. Yes.
Q. The coupler on the tender was a Gould, wasn't it?
A. I can't say that either.
Q. Do you know whether this coupler on the car was a Tower coupler or not?
A. No, I do not.
Q. Is that a sort of model of the coupler head or the head
24 of the drawhead (exhibiting model to witness)?
A. Yes.
Q. And from that coupler there is a lever called a cutting lever comes out on the side of the car and with that lever this is pulled up, isn't it, that pin?
A. Yes.
Q. And this is the thing you say wouldn't meet—that is what you call the knuckle, isn't it?
A. No, the drawhead——

Q. The drawhead is here, but this is at the end of the drawhead?
A. Oh, yes.
Q. And the knuckle or coupling on the other car, if this drawhead was a little off this way, would strike in there, and if it was that way it would strike that and throw it that way, and would not go behind it and couple—isn't that right?
A. Yes.
Q. Then the difficulty was not with the coupler itself but with the fact that the drawhead——
A. Was pushed to one side.
Q. Was pushed to one side, and you pushed the drawhead, or arranged the drawhead? Now, how did you arrange that drawhead? What did you do with the rawhead to make it in line with the coupler on the other car?
A. I pushed it over this way.
Q. You pushed the whole appliance over—you did nothing to this knuckle?
A. No, sir.
Q. And how was it your hand got caught? Where was it your hand got caught?
A. Down in here.
Q. Down between the two?
A. Yes.

25 By the Court:

Q. Was there any way by which that coupling could have been done except in the way you did it?
A. No way I could move the drawhead; no, sir.

By Mr. French:

Q. That is true of all coupling appliances, isn't it, of couplers, that the drawbars or drawheads have to be somewhat in line in order that they will couple when they are opened?
A. Oh, yes.
Q. If that coupling was closed and the other coupling was also closed, they would not couple, would they?
A. No, sir.
Q. And in order to have them couple you would have to have one knuckle open?
A. Yes.
Q. And you would open that knuckle, not by going between the cars, but by this cutting lever on the side?
A. Yes, sir.
Q. You say you were paid from $3.20 to $4.00 a day; your wages were at so much an hour, weren't they, depending on the kind of work you were doing?
A. Each fellow got the same except the flagman and fireman and engineer and conductor.
Q. No, but you as a brakeman were paid so much an hour?
A. Yes.
Q. Depending on the character of work you were doing? If you

were a passenger brakeman you would get a different rate per hour than a freight brakeman?

26 A. Yes.

Q. And if you were in the yard, you would get a different rate from out on the road?

A. Yes.

Q. And what were you getting per hour?

A. Three dollars and twenty cents or thirty-two cents.

Q. Thirty-two cents an hour?

A. Yes.

Q. And by $3.20 you mean for a ten-hour day you would get $3.20?

A. Yes.

Q. What do you mean by $4.00, overtime?

A. Overtime.

Q. You did belong to the Relief Fund, didn't you?

A. Yes, sir.

Q. And you were paid—do you know how much you were paid by the Relief Fund?

A. Since the accident?

Q. Yes.

A. One dollar a day.

Q. Up until now?

A. Up to now? No, not now.

Q. Up to what time, do you remember?

A. I don't remember what time.

Q. Do you remember how much you received in all?

A. I don't remember that either; no, sir; never kept an account.

Q. Was it as much as $170?

A. I can't say.

Q. Was it about that amount?

A. I don't know that either.

Q. Do you think it was about that amount?

A. No, I don't think; I don't know.

Q. Up to what time were you paid?

27 A. I don't remember that either.

Q. Were you paid any after May 5, 1913?

A. I don't remember.

Q. When did the payments stop?

A. I don't know.

Q. Did they continue all of last year, 1913?

A. No.

Q. Did they stop in the summer or in the winter or fall or spring?

A. I don't just remember when they stopped.

Q. Didn't they stop sometime before the fourth of July of 1913?

A. Perhaps they did, I don't know.

Q. Don't you know they stopped sometime in the fore part of May, 1913?

A. I didn't keep an account.

By Mr. Watkins:

Q. Now, Mr. Parker, this Relief Fund—who paid what you did receive from that? Who paid that?

A. The Relief Association.

Q. Had you contributed to that fund before this accident?

A. So much a month.

Q. How much a month?

A. Seventy-five cents or one dollar and twenty-five cents, I forget which.

Q. How many months had you been contributing that?

A. Ever since I was in the employ of the railroad.

Q. They paid you then under this Relief Fund; that is made up, is it, from the different employees contributing themselves?

A. Yes, sir.

Q. It does not come from the railroad company, does it?

28 A. No, sir.

Q. And you can't say this morning how much you have received from them altogether?

A. No, sir, I can not.

Q. Now, this cutting lever that is spoken of, is that for the purpose of coupling cars or uncoupling them?

A. Uncoupling them.

Q. It has no effect on the coupling of cars, does it?

A. No, sir.

Q. Now, this appliance—you don't know whether this was the model that was used on the car or not?

A. I don't remember, no, sir.

Q. Now, in order to make that work, it has to be set, does it, directly with the engine or car that is being backed into it?

A. Yes.

Q. Now, how was it on this car that you had your hand injured on?

A. The drawhead on the car was over toward me and the drawhead on the tender was away from me.

Q. Is this connected and fastened to this drawhead that you speak of?

A. This what-you-call-it here is connected with the drawhead.

Q. The drawhead and this work together?

A. The drawhead comes in here, yes, sir.

Q. So that if the drawhead is out of place on the car, this would also be out of place, would it (indicating model)?

A. Yes, sir.

Q. And it would be useless as far as coupling the cars were concerned?

A. Yes, the cars would not couple.

Q. This clerk now that you spoke about—you called him

29 a clerk—what were his duties there? What did he do?

A. Why his work is to wait on the customers when they come in.

Q. Now, what kind of restaurant do you have there?

A. Oh, light lunch, oysters and cigars, tobacco, ice cream.

Q. That work which he is doing, would you be able to do were it not for the loss of your arm?
A. If I had both hands I would, yes.

By Mr. French:

Q. You could do some of the work that he does with one hand, couldn't you?
A. Do some of it, yes, sir.

Dr. HARRY B. CHALFONTE, sworn.

By Mr. Watkins:

Q. Doctor, where do you live?
A. Mullica Hill.
Q. And you are a physician, a practising physician?
A. Yes, sir.
Q. Have been for how long?
A. Six years.
Q. A graduate of what college, Doctor?
A. Hahnemann.
Q. Philadelphia?
A. Philadelphia.
Q. Have you been attending Mr. Parker, the plaintiff?
A. I have.
Q. Since when?
A. He came in my office first on the 7th of December.
Q. What year?
A. Nineteen hundred and twelve.
Q. And what was his physical condition at that time?
A. He had been discharged from the Jefferson Hospital following an amputation about the middle of the left forearm.
Q. What did you attend to him for?
A. I redressed it up until—along all through December and January.
Q. Well, off and on up until what time?
A. I will have it in a moment—that is just what I am looking for—up until the 8th of April, when it became necessary to remove a portion of the bone from the arm.
Q. Now, what did you do in removing that bone from the arm?
A. Made an incision or cut down over the outer bone of the arm and removed three pieces of decayed bone from the stump.
Q. Previous to that time had you performed any other operation on it?
A. No, none other than simply redressings.
Q. Has the arm yet healed?
A. Not quite; it was necessary about ten days—I guess ten days or two weeks ago—I haven't that date with me—there was another portion of the bone that I was compelled to remove.
Q. Now, can you say, Doctor, whether it will be necessary to have further——
A. I cannot; I don't know.

Q. It is uncertain?
31 A. Uncertain.
Q. What has been your bill, Doctor, or what are your bills?
A. I think somewhere between eighty and ninety dollars all told. Now, part of that was paid cash in the office and part I think was charged and without looking it up, I could not say positively, but I think somewhere between eighty and ninety dollars.

Cross-examination.

By Mr. French:

Q. What was the occasion of the necrosed bone—what caused it?
A. Lack of circulation.
Q. No disease or anything?
A. Well, where circulation stops in any bone it causes necrosis or death of the bone, and it has to be removed.

By Mr. Watkins:

Q. What occasioned, Doctor, the necrosis of the bone in this case?
A. Where an amputation is performed, any portion of the bone that is not closely united with the main shaft of it, for any reason at all, the circulation is not re-established in and about that portion of the bone, it will necross or die. It is simply due to lack of nourishment that is carried there to the bone by the blood.
Q. But the cause of the necrosis in this case, outside of the lack of circulation of the part——
32 A. I don't know, because I had no ray of it at all, I couldn't tell whether the bone had been—this portion of the bone had been cracked away from the main shaft or whether it was just simply lack of circulation of the part.
Q. Did you know Mr. Parker before this accident?
A. Yes.
Q. Did you treat him for anything?
A. Occasionally, yes.
Q. What for? Anything organic?
A. No, just simply for——
Q. What was the general condition of his health?
A. Why, perfect, as far as I know.
Q. Could this necrosis of the bone come from an accident such as he had?
A. Oh, yes, because on account of the crushing of the part.
Q. Now, in your examination of him, did you notice anything else in his physical condition which could have produced it?
A. No, certainly not.

Dr. CHARLES F. FISLER, sworn.

By Mr. Watkins:

Q. Doctor, you are a practising physician at Clayton?
A. I am.

Q. And how long?
A. Eighteen years.
Q. In November last, did you see Mr. Parker, the plaintiff?
A. I did—no.
Q. Or November, 1912?
33 A. Yes, 1912, November.
Q. Where?
A. Williamstown.
Q. Where did you see him at that time?
A. At Dr. Black's office.
Q. What was his condition?
A. Well, he had had an injury to his arm; his arm was mashed, a comminuted compound fracture of the radius and ulna, the left arm.
Q. The arm was mashed between what points of the arm?
A. At the junction of the lower with the middle third, I should say.
Q. Was it necessary to amputate that arm?
A. It resulted in an amputation; of course, my opinion at the time was that it might, that is the reason I sent him to the hospital.
Q. You sent him to what hospital?
A. Jefferson.
Q. Have you treated him since?
A. No.

No cross-examination.

Plaintiff rests.

Mr. French: I would like to make a motion for a non-suit here, if it is not too late. The burden is on the plaintiff here to show some negligence on the part of the railroad company to entitle him to recover. He has not shown in his testimony any negligence,
34 therefore there can be no verdict against the defendant, and on the ground that no negligence has been shown on the part of the railroad company, I move that there be a non-suit. If there is any negligence, I fail to see it.
The Court: (After argument.) I will hold this motion; proceed with the defence.

The Case for the Defendant.

VICTOR L. MOREAU, sworn.

By Mr. French:

Q. Mr. Moreau, are you an employee of the defendant company?
A. I am.
Q. In what capacity?
A. Conductor.
Q. How were you employed in November, 1912?
A. Conductor.
Q. Where, on what particular branch?

A. On the Mullica Hill or Williamstown branch.
Q. And who had charge of the train in which the plaintiff, Mr. Parker, was injured?
A. I did.
Q. Where was that train made up before proceeding to Mullica Hill?
A. Williamstown Junction.
Q. Who made it up?
A. My men.
Q. Who were the men?
35 A. H. V. Datz, Lewis Parker, Matthew Firman.
Q. They were brakemen?
A. Brakemen.
Q. Were they all brakemen?
A. That is all; the flagman was not there.
Q. Was there a man named Murphy there?
A. Murphy.
Q. What was he?
A. He was flagman; he wasn't there; I don't remember, I guess not.
Q. Of whom did the engine crew consist?
A. George Eldredge, Elmer Hurd, fireman.
Q. Were you present when the train was made up at Williamstown Junction?
A. I was under the orders for the train.
Q. You were not there assisting in making it up?
A. No, I did not assist.
Q. When you started from Williamstown Junction, how many cars did you have in your train?
A. Five cars.
Q. What were they?
A. Two empty cars and three loaded cars.
Q. Where were the two empties?
A. Ahead, next to the engine.
Q. And what was next to the two empties?
A. A car for Williamstown.
Q. Do you know what it had in, of your own knowledge?
A. Why, I don't quite remember; I think the ticket said something about——
Q. Not what somebody else told you.

A Juror: If your Honor please, we can't hear half of that testimony.

Q. These gentlemen say they can't hear you; you will have to speak up so they can hear.
36 The Court: Turn your face to the jury and talk.
Q. Do you know what this car next to the empties had in of your own knowledge?
A. No, I do not; I don't know what it contained.
Q. What was the car next to that?
A. A car for Richwood.

Q. What kind of a car was it?
A. It was an N. C. & St. L.
Q. Do you remember the number?
A. Four thousand five hundred and fifteen—four numbers.
Q. What sort of coupling attachments were on that car?
A. Tower.
Q. What do you mean by a Tower coupler?
A. That is—well, it is one like this one here.
Q. Is that a model of the Tower coupler, as far as you know?
A. That is a model, yes, sir.
Q. Do you know whether the appliance, the coupling appliance on that car 4515, worked properly?
A. It did.
Q. How long have you been engaged in railroading, either as conductor or brakeman?
A. Nine years.
Q. Familiar with coupling appliances?
A. I am.
Q. Are there many or few kinds of couplers?
A. There is many of them.
Q. If in good order, do all those couplers couple automatically by impact?
A. They do.
Q. The coupler the model of which is before you is only the head of the drawbar, isn't it? That is only part of the drawbar?
37 A. That is all.
Q. And back of that is a long iron or steel part?
A. Yes.
Q. What do they call that part back?
A. The neck.
Q. And how is that neck fastened into the car?
A. It is fastened in with springs and bolts.
Q. And does that work from side to side?
A. It does.
Q. Could a train get around a curve unless those necks were so that they would work laterally?
A. No, sir, they could not, not a sharp curve, it would raise the trucks off the track.
Q. Are you familiar with the track at Williamstown where this accident happened?
A. I am.
Q. Were you present when the accident happened?
A. I was not.
Q. Where were you?
A. Just going in or just coming out of the—just going in the caboose.
Q. And the caboose is at which end of the train?
A. Rear end.
Q. Did you go there after the accident?
A. I did.
Q. Did you look at the coupler?

A. Not immediately after the accident.
Q. How soon after the accident?
A. The next morning.
Q. Was there anything defective or wrong about the coupler?
A. Nothing wrong that I could see.
Q. Describe the train movement by which this car ahead, the N. C. & St. L., did you say 4515?
A. Yes.
Q. Was put off at Williamstown? What was the movement?

38 A. The movement was, the cut was behind the N. C. & St. L.; that was the cut in the first place and Parker cut wrong, cut the wrong car off, and this car was then kicked back toward the train leaving that car standing there.
Q. Then this 4515 was standing by itself, was it?
A. By itself; then it was cut away from the Pennsylvania car that was set off at Williamstown, was cut away from this car and set aside.
Q. Who cut the Pennsylvania car away from 4515?
A. Lewis Parker.
Q. He did?
A. Yes.
Q. Are you sure about that?
A. I wouldn't say; I can't say; I don't remember.
Q. Well, don't say unless you know; he says he didn't?
A. I wouldn't say.
Q. Then what did they do with the Pennsylvania car?
A. It was set off on the side track at Williamstown in the yard.
Q. In what way was it done?
A. It was pulled ahead and backed in with the engine.
Q. And then was the engine coming back to couple up with car 4515?
A. Yes, it was.
Q. Who was giving the signals to the engine coming back?
A. Lewis Parker.
Q. The plaintiff here?
A. The plaintiff.
Q. And was any other person giving any signals?
A. I didn't notice anyone else giving signals.
Q. Then the engine was moving under his signal entirely?

39 Mr. Watkins: I object to that as a conclusion.

Q. Under whose direction was the engine moving as it was coming back to couple up to the 4515 car?
A. Why, it was Lewis Parker, he was standing on the back step of the engine when I saw him.
Q. Standing on the back step of the engine or tender?
A. Or tender, standing on the steps of the tender, giving a back-up signal.
Q. When you saw him?
A. When I saw him.

Q. How long did you see him doing that?
A. About two car lengths, I would judge.
Q. Then what did you see him do?
A. Well, I went in the caboose.
And you didn't see anything except the engine coming back?
That was all; I didn't see nothing else.
Q. Are you familiar with the duties of a brakeman in making a coupling?
A. I am.
Q. What are his duties with respect to going in between a car when he has given the engine the signal to come back?
A. First stop the engine; give the signal to the engineer to stop, and if there is anything wrong with the coupler, after giving a stop signal, to place the knuckles or drawheads in the proper position.
Q. You say all these couplers couple automatically by impact?
A. They do.
Q. But if these drawheads are very much out of line, will they couple if they strike and are open?
A. No, they won't.
Q. And what is necessary to be done with all of them?
40 A. It is necessary to move the drawheads.
Q. Is that so with respect to all of them?
A. Not all of them, no.
Q. Which ones?
A. If the car is on a very bad curve, then it is necessary to set them.

By the Court:

Q. How is that done?
A. Pushing the drawheads over and placing them in position.
Q. Well, that is the way the plaintiff did it?
A. Well, it is necessary for all these cars to have this play in them; they have to get a certain amount of play, the drawheads, you know, the necks of the drawheads.

By Mr. French:

Q. But his duty was to give the signal to stop?

Mr. Watkins: I object; the testimony has been given here as to what his duties were fully, and it is not for Mr. French now to suggest and lead the witness to say something else.
The Court: I think that is proper; I see no impropriety in the question.

A. To stop.
Q. Was there much of a curve at the place where this 4515 was standing?
A. No, there was not.
Q. Was it perceptible or just perceptible—how much of a curve was there?
41 A. Just a trifle; I could not give the degrees exactly.

Cross-examination.

By Mr. Watkins:

Q. There was a curve there, was there, Mr. Moreau?
A. Just a slight curve, yes.
Q. And it is necessary at times to push the drawhead, as Mr. Parker did it in this case, when the train is on a curve to make the coupling?
A. Yes.
Q. And it was necessary in this case, wasn't it?
A. Just the same.
Q. As far as you know?
A. In some cases.
Q. As far as you know it was necessary in this case, wasn't it?
A. It was.
Q. You are not an engineer, not a mechanic?
A. No, sir, I am not.
Q. You never put any time in studying mechanics?
A. No, sir, I have not.
Q. You did not see the accident—the last that you saw of Mr. Parker was that he was riding on the tender of the engine?
A. The last I saw of him.
Q. You did not look at this coupler that was on this car where the accident occurred until the next morning, did you?
A. The next morning.
Q. And where was the car then?
A. At Richwood.
Q. On a siding?
42 A. On a siding.
Q. A straight siding?
A. Yes.
Q. The car standing straight?
A. Yes.

By Mr. French:

Q. I want to understand about the drawbars; you say that some of them will couple on a curve and some won't or will all of them? What is the truth about the drawheads coupling on a curve?
A. You mean without setting?
Q. Yes.
A. Well, sometimes they do and sometimes they don't on a bad curve, but then this curve——

Mr. Watkins: I object to this curve; you were not there at the time of the accident.

Mr. French: He says he was.

Mr. Watkins: He did not see the accident.

Mr. French: He was on the car; he was the conductor in charge of the train.

Mr. Watkins: He has already testified he did not know whether it was necessary for Mr. Parker to have done that in this case or not; that is his testimony.

The Court: I think it is a proper question; the objection is overruled.

(Question repeated.)

43 Q. What about this curve?

A. Why, not always on a short curve at that time.

Q. What do you mean by a short curve, a sharp curve?

A. No, I mean long.

Q. Not much of a curve?

A. Not much of a curve, that is it.

By Mr. Watkins:

Q. You say not always on a short curve; sometimes, do you mean on a short curve, it is necessary?

A. On real sharp curves, yes.

Q. But sometimes it is necessary on any curve, isn't it?

A. Yes, sir, it is.

By Mr. French:

Q. Sometimes it is necessary when they are on a straight track, isn't it?

A. It is.

Q. That is not any defect in the coupling apparatus, is it?

A. Not at all; that is something that has got to be there, the play in it.

By Mr. Watkins:

Q. But when the car is in such a position that the brakeman has to shove the drawhead over to make the coupling work, the coupling would not work automatically unless he did shove it over, wouldn't it?

A. No.

44 By the Court:

Q. But do you say, though, it is customary for the brakeman who is going to do that to have the train stop?

A. It is, yes, sir.

Q. And not do it while the train is in motion?

A. No, sir.

By Mr. Watkins:

Q. Well, but don't they often do it when the train is in motion?

A. They do at their own——

Q. Never mind; do they or do they not?

A. They do.

By Mr. French:

Q. If you were to do it when the train was in motion, you would take the risk of being hurt, wouldn't you?

Mr. Watkins: I object; the statute provides that obvious risk shall not enter into a case of this kind.

Mr. French: Pardon me; the statute provides that obvious risk is

in all cases unless there is some proof that the train was not equipped with this safety appiance, and there is not the slightest evidence here that this train was not so equipped; the evidence is that it was so equipped, consequently the doctrine or defence of obvious risk does appear.

(Question repeated.)

45 The Court: That is merely his judgment; it seems to me that is a question of law. The objection is therefore sustained.

Mr. French: I ask an exception to the ruling.

GEORGE S. ELDREDGE, sworn.

By Mr. French:

Mr. Eldredge, speak so the jury can hear you.
A. I will try to, Mr. French.
Q. You are employed by the Atlantic City Railroad Company?
A. Yes.
Q. In what capacity?
A. Engineer.
Q. How were you employed in November, 1912?
A. As engineer.
Q. On what train?
A. On the Mullica Hill shifter.
Q. Now, where did you run the train from and to?
A. We ran from Mullica Hill to Williamstown Junction and return.
Q. Do you remember the time of the accident?
A. I do not, Mr. French, exactly.
Q. That is, you remember the accident but cannot remember the date?
A. Oh, yes, sir, I remember the time; I thought you meant the hour.
Q. Were you engineman on that train?
A. I was.
Q. What were you doing at Williamstown?

46 A. Well, we came into Williamstown there, and had one car to set off on the side track, and we stopped there and we cut back of two instead of one; we pulled ahead a little; then we stopped again to cut one car off, then went ahead and set this car off on a what we call track four.

Q. Then you went ahead with the car to put on track four?
A. Yes.
Q. Do you know who cut the cars?
A. I am not positive, no, sir, who cut it.
Q. How did you set the car on track four?
A. Why we pulled ahead clear of the four switch and backed the car in there.
Q. Then came out with your engine on the main track?
A. Yes, sir, cut the car off and came out on the track.

Q. How is the track there, straight or curved?
A. What, on four?
Q. No, on the main track?
A. On the main track is straight, but No. 4 is a switch.
Q. How about the track that the train was left, was that a straight track or a curved track?
A. Just a slight curve, just enough to say there is a little curve there, is all.
Q. Do you know who was giving the signals or under whose directions you were going back?
A. Yes.
Q. Whose?
A. Lewis Parker.
Q. The plaintiff in this case?
A. Yes.
Q. Where was he as you were coming back to couple up to the train?
A. He was on the back of the tank.
47 Q. By the tank, you mean the tender behind the engine?
A. The tender, yes, sir.
Q. And what was to be done as you came back?
A. He was giving me the signal to come on back to couple up to the car that was standing on the main track.
Q. After he gave you the signal to come back, did he give you any other signal?
A. No, sir.
Q. State what you saw and what happened.
A. Why, he gave me the signal to come back to couple up to this car; then about, I suppose ten feet before he got to the car he jumped off on the ground and we came back and hit the car but the car did not couple, and when we hit the car it jarred away from the tender, I suppose, about that far, and the minute that opened up Lewis ran in there and shoved his drawhead over, which he claimed was not straight and before I could get stopped, why, it caught him and had him fast in there until the fireman got off the tank and went back and lifted the cutting lever and let him loose.
Q. That was the only signal that he gave you, to come back?
A. That was the only signal he gave, to back up, and the minute I saw him go in there, it scared me, because he had such a small opening.
Mr. Watkins: Never mind that remark.
Q. What is his duty with respect to putting the drawhead over?

Mr. Watkins: I object; the man has testified to being an engineer, not a brakeman.

48 Q. How long have you been engaged in railroading?

The Court: The objection is overruled.

A. Fifteen years.

(Exception noted for plaintiff.)

(Former question repeated as follows: What is his duty with respect to putting the drawhead over?)

Q. As to signals?
A. Well, I suppose that sometimes he has to set the drawhead a little, I don't know, I am not back there, I don't know what he has to do.
Q. You don't know, that is all.

Cross-examination.

By Mr. Watkins:

Q. Now, Mr. Eldredge, the last signal that Mr. Parker gave you to come back was when you were about ten feet from the car?
A. I should judge so, yes, sir.
Q. You backed your engine into this car and it did not couple?
A. No, sir.
Q. And you pulled out?
A. No, sir.
Q. Or you stayed there?
A. No, sir.
Q. You were still running? Now, just a minute, please; were you still running?
A. Sure, we hit the car——
49 Q. Now, just a minute; you hit the car and it did not couple?
A. Yes, sir.
Q. Then you saw Parker without any other signal from him go in between the cars to push the drawhead over, did you?
A. Yes.
Q. So it would couple?
A. Yes, sir.
Q. Your engine was still coming back; it had not stopped running when you saw him jump in?
A. Yes, sir; still moving, but very slowly.

ELMER J. HURD, sworn.

By Mr. French:

Q. What is your employment, Mr. Hurd?
A. Fireman.
Q. For what company?
A. Atlantic City Railroad.
Q. How were you employed November 16, 1912?
A. Fireman.
Q. On what train?
A. On the Mullica Hill shifter.
Q. Was the plaintiff, Mr. Parker, a member of the train crew at that time?
A. He was a brakeman.
Q. Did you see the accident?
A. I did.

Q. Just state what you saw.

A. Well, when we came into Williamstown with a light train, we put one car off, and after we put the car off we went out on
50 the main again and backed in against the rest of the train. I was standing on the side of the engine looking back; Mr. Parker was standing on the back of the tank, and when we got right close to the train, Mr. Parker, he got off—he gave a signal to come back to the engineer, Mr. Eldredge, and we hit it and the car kind of bounded off a little—we didn't couple right away; Mr. Parker jumped in and as he did, we came in and caught him, and he hollered and I jumped off an ran back. I lifted the cutting lever and got him out.

Q. Did he give any other signal after he gave the signal to come back?

A. He didn't give no other signal, but just waved his hand to come back.

Q. Did you notice what sort of coupler was on the cars that the tank was going back against?

A. The make of coupler?

Q. The make of coupler, yes.

A. I couldn't tell you the name, just a regular Gould coupling.

Q. A Gould coupling was on the tank, wasn't it?

A. On the tank, yes, sir; I did not look at the other, the name.

Q. How was his hand caught? Illustrate by that model.

A. When I came back there, his hand was in; his hand was caught right down this way (indicating).

Q. Between the two knuckles?

A. The hand was caught back, say, and it had him across here; it broke this part here, right from here over.

Q. You are speaking about the wrist?

A. And took this middle finger, he had this hanging. He only had these two fingers.

Q. And that was between the two knuckles?

A. Right between this and the other one on this part here.
51 Q. Inside.

A. Inside here; it had the imprints of his hand right in here, right where I got him out when I grabbed him.

Q. Then the two couplers had coupled as they came together?

A. Coupled firm and solid.

Q. And caught him?

A. Caught him.

Q. Did you notice anything defective about the couplers?

A. There wasn't nothing defective, as I know of, because just as soon as I lifted the cutting lever it uncoupled.

Q. By lifting the cutting lever, you mean the lever that comes out at the side of the car?

A. Yes, the cutting lever reaches out at the side both on cars and on the engine end, reaches out; I caught the cutting bar and raised it up and as I did it flew open.

Q. How is the track there, straight or curved?

A. The track—well, there wasn't nothing there, what you may

say a curve, just a slight one; it wasn't very noticeable, but there was a slight curve there.

Cross-examination.

By Mr. Watkins:

Q. You saw Mr. Parker give this signal when he was on the tender of the locomotive?

A. To come back; yes, sir.

Q. And how close to the car was he when he jumped off of the tender?

A. Well, now, he was very close; he wasn't so far away from there; I couldn't say just how far, I wouldn't want to say.

52 Q. About ten feet?

A. Oh, I judge it was.

Q. Now, the engine did come back under this signal?

A. The engine came back.

Q. And it did not couple the car, did it?

A. It did not couple the first hit, no.

Q. Did not couple the first hit; then there was something the matter with the coupler, wasn't there?

A. No, sir; if he had——

Q. Now, just a minute; you answer the question.

A. No, sir.

Q. If there was nothing the matter with it, if it was sufficient, why didn't it couple right then and there?

A. The coupling would have coupled if he had come back a little harder, I think, and hit it.

Q. If the engineer had come back harder?

A. Yes, sometimes them couplings won't couple unless you come back a little hard on them.

Q. Then it was because the engineer did not come back harder that the coupling wouldn't work?

A. That is what I think it was, to my ability, my judgment.

Q. Now, then, when he came back and the car didn't couple, it moved the car some little distance, didn't it?

A. Just a little rebound, yes.

Q. And it was then when he came back the second time that Parker got in between the cars, wasn't it?

A. He didn't come back; he was still on the move.

Q. Still on the move?

A. Yes.

Q. And it was then that Parker shoved the drawhead over?

A. He jumped right in.

53 Q. So that it would couple?

A. Yes.

By Mr. French:

Q. Then he got in there in front of a moving train coming back——

A. He did.

Q. Under his own signals?

A. Under his own signals.

By Mr. Watkins:

Q. Did he get in front of the engine?
A. Got in front of the tank, that was the front of the engine at that time.
Q. That was the front of the tank, was it?
A. Yes, or back of the tank.
Q. Now, which was it, the front or back?
A. It was the rear end of the engine; that was the front of it, moving the way the engine was moving.

HENRY V. DATZ, JR., sworn.

By Mr. French:

Q. Are you employed by the Atlantic City Railroad Company?
A. I am.
Q. What capacity?
A. As brakeman.
Q. How were you employed November 16, 1912?
A. As brakeman.
Q. On what branch?
54 A. Williamstown branch.
Q. Do you know Mr. Parker, the plaintiff?
A. I do.
Q. Was he employed in the same crew with you on that day?
A. He was.
Q. The same train?
A. He was.
Q. Do you remember the accident?
A. I do.
Q. Did you assist in making up the train at Williamstown Junction?
A. I did.
Q. Anything wrong with any of the couplers at that time?
A. No, there was not.
Q. After your train left Williamstown Junction, how many cars did it consist of?
A. When we started away from there it consisted of five, two empty gondolas and three box cars; the two empty box cars, we set them in at Reakirts.
Q. Two empty box cars and three loaded cars?
A. I can't say whether the three were loaded or not.
Q. Five cars then?
A. Yes.
Q. What did you do with them?
A. We left two of those in Reakirts, I said.
Q. In leaving those, did you have any trouble with any of the couplers?
A. I did not.
Q. What was your next movement?

A. After we came to Williamstown.
Q. What was done at Williamstown?
A. Mr. Parker cut behind the wrong car, and we pulled it
55 back a ways and realized the mistake and cut back of the one we set at Williamstown; we came back for that on No. 4 switch and put the car on 4.
Q. What were you doing at that time?
A. I was on the roof.
Q. Of the car going back on four?
A. Yes.
Q. What was Mr. Parker doing?
A. He was back on the tank, I suppose.

(Objected to.)

Q. Where was he?
A. I don't know where he was; I didn't see him.
Q. Did you see the accident?
A. I did not.
Q. Why not?
A. I was tying this car down on 4 that we put in there.
Q. Did you help cut the car out?
A. No.
Q. This car that was put in on 4 out of the train?
A. I put a brake on it and let it out.
Q. Did you cut it?
A. I did not.
Q. Mr. Parker made the cut, did he?
A. Mr. Parker made the cut.
Q. What sort of track is there there where the other car was left standing?
A. On the main track?
Q. Yes.
A. A very slight curve.

No cross-examination.

56 MATTHEW FIRMAN, sworn.

By Mr. French:

Q. Are you employed by the Atlantic City Railroad?
A. I am.
Q. In what capacity?
A. Brakeman.
Q. How were you employed on November 16, 1912?
A. Brakeman.
Q. On this train on which Mr. Parker was injured?
A. Yes, sir.
Q. Do you remember the train being made up at Williamstown Junction?
A. Yes.
Q. Did you have any trouble with any of the couplers?
A. No, sir.

Q. After leaving Williamstown, what was the first thing that you did with any of the cars?
A. Put two off at Reakirts siding, the two head cars.
Q. Did you have anything to do with it?
A. Making the switches is all.
Q. Any trouble with the couplers, as you recollect?
A. Not as I recollect.
Q. When you got to Williamstown, what was done there?
A. Cut behind the second head car, made the wrong cut, pulled the car down a ways, cut that off and backed the head car in on the siding.
Q. What did you have to do with it?
57 A. I made the switches.
Q. What do you mean by that?
A. Well, unlock the switch and throw it around so you could go on the sidetrack.
Q. You were at the switch?
A. I was at the switch, head brake.
Q. Did you see the accident?
A. No, sir.
Q. What sort of a track is there at Williamstown there where the car was left standing?
A. On a slight curve.

No cross-examination.

ALBERT MURPHY, JR., sworn.

By Mr. French:

Q. Are you employed by the Atlantic City Railroad Company?
A. Yes.
Q. In what capacity?
A. Brakeman.
Q. How were you employed November 16, 1912?
A. I was the flagman.
Q. What train?
A. The Mullica Hill shifter.
Q. The same train Mr. Parker was in the crew of?
A. Yes, sir.
Q. As flagman, what are your duties?
A. Well, to go out and flag the rear end of the train when we stop.
Q. Did you have anything to do with coupling or uncoupling cars?
58 A. No, sir.
Q. Did you see the accident?
A. No, sir.

No cross-examination.

HENRY V. DATZ, JR., recalled.

By Mr. French:

Q. How long have you been a brakeman, Mr. Datz?
A. Since August 7, 1907.
Q. What are the duties of a brakeman with respect to going in and arranging a drawhead or lining the drawhead with an engine coming back?
A. He should keep out.
Q. Well, I know, but has he to do anything before he goes in?
A. Well, to first see that the engine or cars are not close enough to him to catch him, and he should set the knuckles, that is, to the best of his knowledge of them so they will couple and so that it will enter, and get out.
Q. Has he any duty with respect to giving any signals to the engineer?
A. He has.
Q. What is it?
A. Well, to bring the engine back in order to insure not hitting the car too hard, to show the engineer where the car is.
Q. Suppose he wants the engineer to stop, how does he get him to stop?
A. Gives him the stop signal.

59 Cross-examination.

By Mr. Watkins:

Q. You say part of his duty is to see that the knuckles work?
A. To see that they are set, yes.
Q. What do you mean by the knuckle?
A. See that they are open; this here thing is a knuckle.
Q. It is part of his duty to see about that?
A. Yes.
Q. And he generally sees that when the engine is coming back, don't he?
A. Well, when the engine is sufficient distance to insure safety, see that it is all right.
Q. Have you ever coupled cars?
A. Thousands of them.
Q. And haven't you done just like Mr. Parker did in this case?
A. No, I didn't do just like him, because I would have got my hand caught if I had.
Q. Didn't you put your hand in to push the drawbar over?
A. I did while the engine was away.
Q. While the engine was in motion?
A. While the engine was in motion a good ways up.
Q. While the engine was in motion you have done it?
A. While the engine and cars was in motion down the track.
Q. It is a common thing for brakeman to do it, isn't it?
A. It is a common thing for them to set the knuckle in coupling cars.

60 Q. They have to do that, don't they?
A. Exactly.
Q. And when the train backs and hits and it don't couple, it is the proper thing for the brakeman to put his hand in there and push it over so it will couple?
A. No, he gives the stop signal first.
Q. Wait a minute; I didn't ask you that. It is a common thing when the engine backs and it don't couple for the brakeman to put his hand in and shove it over so it will?
A. I say he gives the stop signal first.

Mr. Watkins: I ask that that be stricken out. (To the witness.) You will answer the question.
The Court: The question is whether it is a common thing or not for him to do it?
The Witness: Well, they do it, yes.

By Mr. French:

Q. Now, is it a common thing for them to do it without giving the signal to stop?
A. It is not; they give the signal to stop first and then adjust the knuckle.

WILLIAM C. MAY, sworn.

By Mr. French:

Q. What is your business, Mr. May?
A. Passenger car repairer.
Q. Who are you employed by?
61 A. By the Reading Company.
Q. Where were you employed in November of 1912?
A. Camden shop, Bulson Street.
Q. Do you remember car N. C. St. L. 4515?
A. Yes, sir.
Q. Did you inspect that car any time in November, 1912, the coupling appliance?
A. November 18th.
Q. Where?
A. Richwood.
Q. You went down there to see it, did you?
A. Yes.
Q. What did you find?

Mr. Watkins: I object; this inspection took place afterward; it is after the accident.
(Objection overruled.)

Q. What did you find with respect to the coupler?
A. Found the coupler in O. K. order.
Q. Any defects in it?
A. No defects at all.
Q. Did you measure the drawhead, the distance from the top of the rail?

A. Gauged the coupler.
Q. How did it gauge?
A. Five and an eighth.
Q. Is that——
A. That is the standard.

Cross-examination.

By Mr. Watkins:

Q. What are you, a car inspector? What do you mean by car inspector?
62 A. I ain't no car inspector, passenger car repairer.
Q. Passenger car repairer?
A. Yes, sir.
Q. That is your duty?
A. Yes.
Q. I thought you said you were a car inspector?
A. No, sir.
Q. A passenger car repairer?
A. Yes, sir.
Q. Was the coupling appliance on this freight car the same as you use on your passenger car?
A. Well——
Q Answer the question, was it?
A. No, it is a little different.
Q. No is your answer. Now, where was the car when you saw it?
A. Richwood.
Q. And it was after the accident?
A. After the accident.
Q. Two days afterward?
A. Yes.

By Mr. French:

Q. In what respect do the couplers differ on passenger cars and freight cars?

Mr. Watkins: I object; he has not qualified yet as a man knowing anything about the kind of couplers on freight cars.

Q. How long have you been familiar with couplers on cars, passenger and freight?
A. Seven years.
Q. To what extent have you become familiar with them? What have you done to make yourself familiar with them?
63 A. Well, I have put them in the cars, connected them up.
Q. You have done what?
A. I have put them in cars, connected them up.
Q. And all kinds of couplers, passenger and freight?
A. All kinds, passenger and freight.
Q. Now, in what respect does a passenger coupling on a passenger car differ from that on a freight car?
A. Well, there is different makes on freights.

Q. The only difference is the make of the coupler, isn't it?
A. Yes, sir.
Q. They all practically couple with knuckles, don't they?
A. Knuckles; yes, sir.
Q. But the front of the coupler, the knuckle, is the same in all of them, isn't it, practically?
A. Practically, yes.
Q. But the method in which that coupler is thrown open differs?
A. Yes, there is different makes, you know.
Q. There are about seventy or eighty different makes, isn't there?
A. Oh, nearly a hundred different kind of drawheads.
Q. What sort of coupler was on this N. C. & St. L. 4515?
A. That was a Tower coupler.
Q. Is that a model of the Tower coupler?
A. That is it.
Q. Is it or isn't it?
A. That is it.

By Mr. Watkins:

64 Q. Is there any difference in the drawheads that are used on passenger cars and those on freight cars?
A. Well, each company has——
Q. Is there any difference?
A. There is a difference, yes.

By Mr. French:

Q. What is the difference?
A. Well, there is a difference in the cutting levers and then in the knuckles, and then in the make of the drawhead.
Q. Do they all couple automatically?
A. All couple automatically.

Defendant rests.
Both sides rest.

Mr. French: I move for a direction on the same ground I moved for a non-suit, that there is not the slightest evidence of any negligence on the part of the defendant. The full proof is that all the requirements of the Safety Appliance Act have been complied with and that the plaintiff himself, without any negligence of the defendant, was injured by his own negligence. It was a case where his duty was that of a brakeman; the danger was obvious; he knew if he stepped in between the moving tank of the locomotive
65 and the car he was bound to be injured unless he stopped that engine from coming back, and in view of the fact that there is no evidence that the Safety Appliance Act had not been complied with, the question of obvious danger and risk remains as a defence to this defendant; and on the ground that there is no negligence on the part of the defendant shown, and on the ground that the plaintiff by his own negligence contributed to the accident, and on the further ground that he took the risk of going in there and mak-

ing the coupling without giving the engineer the signal to stop, he is debarred from a recovery against this defendant.

The Court: (After argument.) Now, I want you to submit me a brief this afternoon, I will dispose of this matter to-morrow morning. Governor Watkins, I will ask you to do the same, such cases as you have.

At this point a recess was taken until Thursday morning, June 11, 1914, at 10 o'clock A. M.

WOODBURY, NEW JERSEY, June 11, 1914.

Trial of the cause resumed at 10 o'clock A. M. this day in the presence of counsel for the respective parties.

The Court: The motion to direct a verdict is denied.
(Exception noted for the defendant.)

66 *Charge of the Court.*

PARKER
vs.
ATLANTIC CITY R. R. Co.

CARROW, *J.:*

GENTLEMEN: This is an unusual cast and it will require very careful and intelligent consideration from you. The plaintiff and defendant were engaged in an act of Interstate Commerce; plaintiff, a brakeman, was about to couple the tender of an engine to a freight car which was equipped with a Tower coupler. The couplers were intended to couple automatically by impact, but they did not couple in this instance, and in order to make them couple plaintiff was required to fix them with his hands so they would couple, and while he was engaged in doing this his left arm was caught and crushed by the moving tender in such a way as to cause the removal of the arm.

It is said the reason the couplers would not work automatically as they were designed to do was because of a curve in the railroad tracks which prevented them from meeting automatically. The other reason urged why the couplers would not work was because they were not the sort of couplers contemplated by the Act of Congress which I will presently read.

Now, this is an effort upon the part of the plaintiff to charge the defendant with negligence. That means a neglect of duty. The plaintiff cannot recover unless you are convinced by a preponderance of evidence that the defendant was negligent in whole or in part,
and that as a result thereof the plaintiff was injured. A case
67 of negligence must be proved; it cannot rest upon mere guess
work or haphazard conclusion. The law requires proof in such a case either of the specific fact of negligence, or of facts and circumstances from which negligence can be reasonably and legitimately inferred.

This suit is brought upon a Federal statute, and I will read to you some of the provisions of this statute: "That every common carrier by railroad while engaged in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states and territories, or between the District of Columbia or any of the states or territories, and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee, and if none, then to such employee's parents, and if none then to the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal zone or any other possession of the United States shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or in case of the death of said employee, to his or her personal representative for the benefit of the surviving widow or husband and children of
68 such employee, and if none, to such employee's parents, and if none, then to the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment.

"That in all actions hereafter brought against any such common carrier by railroad under and by virtue of any of the provisions of this act to recover damages for personal injuries to an employee, or when such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; that no such employee that may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

"That in any action brought against any common carrier under and by virtue of any of the provisions of this act to recover damages for injuries to or the death of any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

What is meant by contributory negligence respecting the first ground of negligence claimed, is where the plaintiff, endeavoring to

recover damages upon the ground of negligence, has himself
69 contributed in a negligent way to his own injury. Under this law, if this plaintiff contributed to his own injury his action is not to be barred for that reason, but the jury in assessing the damages, if they find that the defendant was guilty of negligence in whole or in part, must take the plaintiff's contributory negligence into consideration, if any there be in the case, and make a fair deduction from the amount which they otherwise might find against the defendant. The law is that the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee. Hence, if plaintiff was more to blame than the defendant, of course you would have to take off a good deal. The theory of the law is that the defendant shall not be required to pay any more than it should pay; as a matter of justice, the plaintiff should be made to bear his proportion of the expense as well as the defendant.

The plaintiff's case has two features or two grounds of negligence. The first is said to come within the first section of the act which I read, "For such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment." I think the second section is practically the same.

In the consideration of this case you are to determine whether a case of negligence has been made out against this defendant within the provisions of the law which I read to you. Did the injury complained of result in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason
70 of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment? That is a question for you to determine, gentlemen of the jury, after considering all the evidence, whether or not a case of negligence has been made out against the defendant within the contemplation of that act. If you find that it has, then you may consider the question of the plaintiff's contributory negligence, that is to say, if you find that the defendant was negligent in whole or in part, which negligence resulted in the plaintiff's injury, and you find also that the plaintiff himself was negligent, then you will adjust the damages fairly and reasonably in the way I have indicated. You will take off of the amount which you might otherwise find against the defendant, or you will diminish it in proportion to the amount of negligence attributable to such employee; because it was never the purpose of the law that the railroad should bear all of the expense or damages as I have shown by this Federal law.

Now, there is another ground of negligence which the plaintiff urges against the defendant, and that is based upon this other part of the law which I will read to you: "That on or after the first day of January, 1898, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in

moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars." The contention of the plaintiff in this case is that the couplers in question were not such as were within the provisions of this act; that the railroad company violated the provisions of this act. Whether that
71 ground of negligence has been sustained or not, gentlemen of the jury, depends upon proof; there must be proof in the case of sufficient preponderating force to convince you that the couplers were not of the character demanded by this statute before you can adjudge the defendant guilty of negligence upon this second ground. If you find that the couplers were not couplers coupling automatically by impact, which could be coupled without the necessity of men going between the ends of the cars, then the matter of contributory negligence will have nothing to do with the case; that feature of the case must be eliminated altogether; if the couplers were not the kind of couplers called for by this law, then you cannot take into consideration the question of the plaintiff's contributory negligence, because it wouldn't have anything to do with the case. The defendant in that event would have to pay all the damages. But if you find, upon the other hand, that the couplers were the kind of couplers called for by the law which I read to you, then you will have to consider the plaintiff's contributory negligence seriously. There is evidence in the case, and evidence that has not been disputed, that it was the duty of the plaintiff before attempting to adjust those couplers with his hands to stop that locomotive engine. If he went in there between the cars while that train was in motion, it is a serious question whether his action is not barred by contributory negligence. That, gentlemen, is a question for you to consider; you will have to consider it in the light of all the facts, because it is a jury question, but it is a serious question and cannot be passed by carelessly; it is a question that requires careful thought and your best judgment.

72 Now, coming back to the first ground of negligence, if you resolve the question of negligence against the defendant upon the first ground of negligence which I stated to you, you will in measuring the damages allow the plaintiff fair and reasonable compensation for such medical expenses as he has been put to or may be put to in consequence of his injury, for the pain and suffering that he has endured or may endure and for such permanent disability as he has sustained. Of course, upon the first ground of negligence which I stated to you, you would have to take into consideration plaintiff's own contributory negligence; if you find that he was guilty of contributory negligence, then, of course, you will have to take off, diminish the amount which you would otherwise find, so that he would bear his share of the burden of this expense himself. I have already stated to you the law upon that.

If you adjudge the defendant guilty of negligence upon the other ground which concerns directly the character of the couplers then of course you will find damages for the plaintiff—you will find fair the reasonable compensation for the plaintiff, taking into considera-

tion his medical expenses, pain and suffering, physical disability, and not take off anything for any contributory negligence, because that would not be a feature of that branch of the case.

I have been asked by the defendant to charge some requests.

1. That the legal presumption is that the defendant obeyed the law and plaintiff is bound to show negligence. That, gentlemen, is true; I have already stated that, that the burden of proof is upon the plaintiff to make out a case, not only a slight case, but a case of preponderating force, a convincing case.

73 2. That substantial evidence of the facts which constitute the cause of action in this cause is indispensable to entitle the plaintiff to recover. That I have already said to you; I affirm that proposition, of course.

3. That mere proof of a defective coupling is not sufficient. There must be proof that the defect was due to defendant's negligence. I so charge you.

4. That if the jury find from the evidence that the injury to plaintiff was partly caused by defendant's negligence, and also find that plaintiff was negligent in putting his hand on the coupler while the engine was coming back under his signal, then the damages must be diminished by the jury in proportion to the amount of negligence attributable to the plaintiff.

That would be so, gentlemen, upon the first proposition of negligence which I stated, but if you find—if you base your verdict of negligence against the defendant upon the second proposition, that the couplers were not such as were contemplated by the Act of Congress, then that would not be so. I think I have stated that with sufficient clearness.

6. If the jury find that the coupler was such a coupler as would couple automatically by impact and was in order, then the plaintiff assumed the risk of his employment and the verdict must be for the defendant.

I refuse to charge that, gentlemen, and submit that proposition to you as a jury question. That is for the jury to determine, but I have already stated, however, that in the matter of the assumption of risk of course anything that was obvious to the plaintiff,

74 that he might reasonably anticipate, was a risk that he assumed, providing the couplers were the sort of couplers, the character of couplers contemplated by the Act of Congress.

7. If the jury find from the evidence that the plaintiff could have reasonably anticipated the result of putting his hand on the coupler while the engine was coming back under signal, it was a risk of his employment known to him which he assumed and the verdict must be for the defendant.

That is for you to say, whether or not, providing the couplers were the sort of couplers provided for by the Act of Congress, the plaintiff did not assume the risk himself, because he was an intelligent man and an experienced man. That, gentlemen, is a question for you to determine under all the facts and circumstances. That is all I have to say; you may retire.

Defendant's Exceptions.

The defendant, by its counsel, prays a bill of exceptions to the charge of the Court in each of the following particulars, viz:

1. To that portion of the charge where the Court says to the jury that we had left a car standing in a position that when the engine came back the coupler would not work. On the contrary, the coupler did work and the only question was whether he had moved the coupler so it would work; and a bill of exceptions is allowed and sealed accordingly.

——— ———, *Judge.* [SEAL.]

75 The Court: (To the jury.) I wish to say to you, gentlemen of the jury, that the Court did not intend to say as a fact that the couplers did not work. What the Court meant was that the contention of the plaintiff was that they did not work, so that he was required to adjust them with his hands. That is the plaintiff's contention in this case, but whether or not that is a fact, is a jury question.

Mr. French: I also ask an exception to the Court's leaving the question of the couplers to the jury, that they were couplers that would couple automatically by impact, in the absence of any proof that they would not, and in the presence of proof that they would and did; and a bill of exceptions is allowed and sealed accordingly.

——— ———, *Judge.* [SEAL.]

3. Also to the refusal of the Court to charge as requested by the last request and to charge the next to the last request to charge; and a bill of exceptions is allowed and sealed accordingly as to each request so refused.

——— ———, *Judge.* [SEAL.]

4. Also to the Court admitting the case to the jury; and a bill of exceptions is allowed and sealed accordingly.

——— ———, *Judge.* [SEAL.]

76 Form C 248—11-9-15—C5.

STATE OF NEW JERSEY:

Court of Errors and Appeals, November Term, 1914.

Appeal from Supreme Court.
Error to —— Court.

LEWIS S. H. PARKER
and
ATLANTIC CITY RAILROAD CO.

No. 65 of Nov. Term, 1914.

Date March, 1915.

Chancellor, presiding.
Opinion by Walker, C.

Check list.	Affirmed.	Reversal.	M.
The Chancellor	1	.....	.....
" Chief Justice	1	.....	.....
Mr. Justice Garrison	1	.....	.....
" " Swayze	1	.....	.....
" " Trenchard	1	.....	.....
" " Parker	1	.....	.....
" " Bergen	1	.....	.....
" " Minturn	1	.....	.....
" " Black	1	.....	.....
Judge Bogert	1	.....	.....
" Vredenburgh	1	.....	.....
" White	1	.....	.....
" Heppenheimer	1	.....	.....
" Williams	1	.....	.....
Totals	....	.....	.....

Filed Mar. 1, 1915. David S. Crater, Clerk.

77 New Jersey Court of Errors and Appeals, November Term 1914.

No. 65.

LEWIS S. H. PARKER, Respondent,
v.
ATLANTIC CITY RAILROAD CO., Appellant.

Opinion.

A brakeman employed by a railroad company operating a railroa engaged in interstate commerce, inserted his arm between an engin

tender and the car next back of it to make an adjustment of the couplers owing to the fact that they would not work automatically by impact, and his arm was crushed, necessitating amputation. He sued and recovered damages. Held, that

Under the "safety appliances act" the duty of the railroad company to provide car couplers which would couple automatically by impact was an absolute duty; and from the fact that the couplers did not so work on the given occasion, it was inferable that the company had failed to comply with the standard raised by the "safety appliances act," and, therefore, under the "Federal employers' liability act" the employee was to be held not to have been guilty of contributory negligence, nor to have assumed the risks of the employment, and the case was properly submitted to the jury.

On Appeal from the Supreme Court.

For appellant, French & Richards.
For respondent, David O. Watkins.

The opinion of the court was delivered by Walker, C.

The plaintiff was a brakeman employed by the defendant company, admittedly operating a railroad engaged in interstate commerce in November, 1912, when he was injured while coupling an engine-tender to a car. Owing to the fact that the couplers would not work he inserted his arm between the tender and the car next back of it, to make an adjustment, when his arm was crushed, necessitating amputation. The action was tried at the Gloucester
78 circuit and a verdict was rendered by the jury in favor of the plaintiff for the sum of $3,000.00, and defendant appeals, specifying as grounds, the denial of motions to non-suit and direct a verdict, and sundry alleged errors relating to the charge of the court and refusals to charge as requested.

By an act of Congress of March 2, 1893, Ch. 196, 27 Stat. L. 531, 6 Fed. Stat. Anno. p. 753, commonly called the "Safety Appliances Act," it was provided inter alia that from and after January 1st, 1898, it should be unlawful for any common carrier engaged in interstate commerce by railroad to haul or permit to be hauled or used on its line any car in moving interstate traffic not equipped with couplers coupling automatically by impact, and which cannot be uncoupled without the necessity of men going between the ends of the cars. It has been held that this provision is applicable alike to acts both of coupling and uncoupling. Chicago, &c. R. R. Co. v. Voelker, 129 Fed. Rep. 522, 526. It is further provided by this act that any employee of any such common carrier who may be injured by any locomotive, car or train in use contrary to this provision shall not be deemed thereby to have assumed the risk thereby occasioned.

By act of Congress of April 22d, 1908, Ch. 149, 35 Stat. L. 65, Fed. Stat. Anno. Supp. 1909, p. 584, commonly called the "Federal Employers' Liability Act," it is provided inter alia that every common carrier by railroad while engaging in commerce between

any of the several states shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence in its cars, engines, appliances, &c.; that any such employee who may be injured
79 shall not be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury; that in any such action such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury. And by amendment of April 5, 1910, Ch. 143, Fed. Stat. Anno. Supp. 1912, p. 335, it is enacted that the jurisdiction of the courts of the United States under the act shall be concurrent with that of the courts of the several states.

In Seaboard Air Line Ry. Co. v. Horton, 233 U. S., 492, Mr. Justice Pitney, speaking for the United States Supreme Court, said at p. 501:

"It is settled that since Congress, by the act of 1908, took possession of the field of the employers' liability to employees in interstate transportation by rail, all such (state) laws upon the subject are superseded."

Therefore the action in the case at bar was of necessity brought under and is governed by the "Federal employers' liability act," and, also, the "safety appliances act."

In St. Louis & Iron Mountain Ry. Co. v. Taylor, 210 U. S., 281, Mr. Justice Moody, speaking for the United States Supreme Court in construing the safety appliances act, said at p. 294:

"In the case before us the liability of the defendant does not grow out of the common-law duty of master to servant. The Congress, not satisfied with the common-law duty and its resulting liability, has prescribed and defined the duty by statute. We have nothing to do but to ascertain and declare the meaning of a few simple words in which the duty is described. It is enacted that 'no cars, either loaded or unloaded, shall be used in interstate traffic which do not comply with the standard.' There is no escape from the meaning of these words. Explanation cannot clarify them and ought not to be employed to confuse them or lessen their significance. The obvious purpose of the legislature was to supplant the qualified duty of the common law with an absolute duty, deemed by it more just. If the railroad does, in point of fact, use cars which do not comply with the standard, it violates the plain prohibitions of the law, and there arises from that violation the
80 liability to make compensation to one who is injured by it.

It is urged that this is a harsh construction. To this we reply that, if it be the true construction, its harshness is no concern of the courts. They have no responsibility for the justice or wisdom of legislation, and no duty except to enforce the law as it is written,

unless it is clearly beyond the constitutional power of the law-making body."

The train upon which the respondent Parker was a brake-man was at a stand still on a slight curve at the time it was uncoupled. What is called the drawhead was out of line and it appears to have been necessary to move it so that the couplers would work. Whether it was out of line because of the position of the engine and cars on the curve it is unnecessary to say. The respondent's injury was occasioned by the fact that the tender would not couple to the car next to it, and Parker slid in between them to push the drawhead over. The tender and car would not have coupled without his having put his arm in for the purpose of manipulating the couplings. It is not an answer to say that the couplers would have worked if the car had been upon a straight track, for the Supreme Court of the United States in Chicago, Rock Island & Pacific Ry. Co. v. Brown, 229 U. S. 317, observed at p. 320, that it was conceded that in the Taylor case, supra. and in Chicago, B. & Q. Ry. Co. v. United States, 220 U. S. 559, that that court settled that the failure of a coupler to work at any time sustained a charge of negligence in that respect, &c.

At the close of the plaintiff's case a motion for non-suit was made on the ground that the burden was upon him to show some negligence on the part of the defendant company; that as he had not shown any such negligence, therefore, there could be no verdict against the defendant. The court reserved the motion.

At the close of the whole case, when both sides rested, a motion was made on behalf of the defendant for the direction of a ver-
81 dict, it being urged by counsel for defendant that the full proof was that all the requirements of the safety appliances act had been complied with and that the plaintiff, without any negligence of the defendant, was injured by his own carelessness, that the danger was obvious, that he knew if he stepped in between the moving locomotive and the car he was bound to be injured unless he stopped the engine from coming back by giving the engineer the signal to stop, and there being no evidence that the safety appliances act had not been complied with, the question of obvious danger and risk was a defense, and that the plaintiff by his negligence contributed to the accident, and therefore could not recover. The trial judge refused the motion to direct a verdict, and submitted the case to the jury who returned a verdict for the plaintiff as stated.

It is unnecessary to review the evidence to ascertain whether, as asserted by defendant's counsel, there was any testimony that the safety appliances act had not been complied with, but that, on the contrary, the full proof showed that it had been, because the United States Supreme Court in St. Louis & Iron Mountain Ry. Co. v. Taylor and Chicago, B. & Q. Ry. Co. v. United States, supra, held that the duty imposed upon an interstate railroad company, in the matter of safety appliances, is an absolute duty to provide cars with couplers which will couple automatically by impact,—a duty which the company cannot escape by showing that it exercised reasonable care in equipping its cars with the required safety appliances or

used due diligence to keep them in repair through proper inspection. That the couplers actually did not work automatically by impact in the case at bar raised at least a presumption that the defendant company had not provided the couplers required by the safety appliances act, and that presented a question for the jury.

Nor was the company entitled to the direction of a verdict
82 upon the ground that the plaintiff might have prevented the injury had he acted otherwise than he did by going between the cars to shove the drawhead over so that the coupling could be effected, because, in that situation some judgment was necessary, and whether he should have selected some other mode of action, or have refrained from acting in the emergency that confronted him, is at least debatable and raised a question for the jury. This rule is laid down by the United States Supreme Court in Chicago, Rock Island & Pacific Ry. Co. v. Brown, supra, (Mr. Justice McKenna writing the opinion), wherein it was held at 9. 317:

"A switchman reaching in between slowly moving cars to remove a coupling pin after repeated unsuccessful attempts to operate the automatic coupler is not, as a matter of law, guilty of such contributory negligence as defeats his right to recover for the resulting injuries, because he did not anticipate that his foot might slip and catch as it did in an unblocked guard rail of which he had, or could be charged with, knowledge."

Besides arguing that the trial judge erred in refusing the motions to non-suit and direct a verdict, it was contended on behalf of the appellant that he also erred in charging the jury in several particulars and refusing to charge as requested in several others. This phase of the case was argued only in a general way by appellant's counsel, as being involved in the law and the facts of the case, and we have not been pointed to anything specifically sustaining the appellant's contentions in this regard. We have, however, examined these matters and find no prejudicial error with respect to them.

Finding no error in the record in the court below, the judgment will be affirmed with costs.

Endorsed: "Filed Mar. 1, 1915. David S. Crater, Clerk."

83 New Jersey Court of Errors and Appeals, March Term, 1915.

Between

LEWIS S. H. PARKER, Plaintiff, Respondent,

vs.

ATLANTIC CITY RAILROAD COMPANY, Defendant, Appellant.

In Error to Supreme Court.

Order on Affirmance of Judgment.

This cause having been duly argued at the November Term, 1914, of this court by Thomas E. French for French & Richards of counsel for the plaintiff in error, and David O. Watkins, of counsel

for the defendant in error, and the court having considered the same, and finding no error in the record or proceedings in the Supreme Court—

It is thereupon, on this First day of March, in the year of our Lord one thousand nine hundred and fifteen ordered and adjudged that the judgment of the Supreme Court, removed by the writ of error in this cause, be affirmed with costs; and that the record be remitted to the Supreme Court to be proceeded with in accordance with this judgment and the practice of said court.

On motion of

DAVID O. WATKINS,
Attorney of Defendant in Error.

[Endorsed:] New Jersey Court of Errors and Appeals, March Term, 1915. Lewis S. H. Parker, Plaintiff, Respondent, vs. Atlantic City Railroad Company, Defendant, Appellant. In Error to the Supreme Court. Order Affirming Judgment. David O. Watkins, Attorney. Filed Mar. 9, 1915. David S. Crater, Clerk.

84 UNITED STATES OF AMERICA,
State of New Jersey:

To the Honorable Mahlon Pitney, Justice of the Supreme Court of the United States:

The petition of Atlantic City Railroad Company respectfully shows that on the Ninth day of March, A. D. 1915, the Court of Errors and Appeals of the State of New Jersey, rendered a final judgment against your petitioner in a certain cause therein wherein Lewis S. H. Parker was respondent and Plaintiff below and your petitioner was appellant and defendant below affirming a judgment of the New Jersey Supreme Court against your petitioner and in favor of said Lewis S. H. Parker for three thousand dollars and costs, as will appear by reference to the record and proceedings in said cause; that said Court of Errors and Appeals is the highest court of said State in which a decision in said suit could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error under the statutes of the United States because the suit in the state court was to enforce a claim of said Lewis S. H. Parker against your petitioner under the Federal Employers' Liability Act and said Court of Errors and Appeals of the State of New Jersey refused to adjudge that there was no evidence of negligence of any of the officers, agents or employees of railroad company, no evidence of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, track, road-bed, works, boats, wharves or other equipment and that *were* was no evidence of any violation by the railroad company of any Federal statute enacted for the safety of employees that contributed to the injury of the plaintiff Parker; and said
85 court also refused to hold or adjudge that the accident or injury to plaintiff was the natural result of his own act, refused to hold or adjudge that the danger was obvious to the plaintiff and

the risk one that he assumed; and said court also affirmed the action of the trial judge in denying a motion to nonsuit, in refusing to direct a verdict for the defendant and in charging and leaving to the jury the questions which he did in the face of the undisputed evidence that the train movement was being directed by the plaintiff, that the couplers were in perfect condition and would and did couple automatically by impact and that the plaintiff admitted on cross examination that all that was necessary to couple was to have one knuckle open and this could be opened by using the cutting lever on the side and not going between the cars, and no evidence being offered of any negligence on the part of the railroad company, as appears by the record and proceedings in said cause which are herewith submitted.

And in said rulings the said State Court of last resort denied to petitioner certain rights, privileges and immunities especially set up and claimed by petitioner under said Federal employers' liability act and the federal safety appliance act.

Wherefore your petitioner prays the allowance of a writ of error returnable into the Supreme Court of the United States and for citation and supersedeas; and your petitioner will ever pray, &c.

ATLANTIC CITY RAILROAD CO,
Petitioner.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Att'ys for Petitioner.

86 Let the writ of error issue as prayed March 23, 1915.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

Endorsed: "Filed Mar. 25, 1915. David S. Crater, Clerk."

87 New Jersey Court of Errors and Appeals.

LEWIS S. H. PARKER, Plaintiff, Respondent,
vs.
ATLANTIC CITY RAILROAD COMPANY, Defendant, Appellant.

Assignments of Error.

Now comes the said appellant and respectfully submits that in the record, proceedings, decision and final judgment of the Court of Errors and Appeals of the State of New Jersey, in the above-entitled matter, there is manifest error in this, to wit:

1. The said Court erred in affirming the denial by the trial court of the motion to nonsuit.

2. The said Court erred in affirming the refusal of the trial court to direct a verdict for Atlantic City Railroad Company.

3. That said Court erred in affirming a finding of the trial court that Atlantic City Railroad Company did not provide its cars with

couplers required by the Federal safety appliance act when there was no evidence justifying such finding.

4. That said Court erred in affirming that part of the charge of the trial judge excepted to on behalf of appellant which is as follows:

"The couplers were intended to couple automatically by impact, but they did not couple in this instance, and in order to make them couple plaintiff was required to fix them with his hands so they would couple."

5. That said Court erred in affirming that part of the charge of the trial judge excepted to on behalf of appellant, which was
88 as follows:

"If you find that the couplers were not couplers coupling automatically by impact, which could be coupled without the necessity of men going between the ends of the cars, then the matter of contributory negligence will have nothing to do with the case; that feature of the case must be eliminated altogether; if the couplers were not the kind of couplers called for by this law, then you cannot take into consideration the question of the plaintiff's contributory negligence, because it wouldn't have anything to do with the case. The defendant in that event would have to pay all the damages. But if you find, upon the other hand, that the couplers were the kind of couplers called for by the law which I read to you, then you will have to consider the plaintiff's contributory negligence seriously."

6. That said Court erred in affirming the action of the trial judge in leaving to the jury, over the objection of the appellant, the undisputed question whether the couplers with which the cars were equipped, would couple automatically by impact.

7. That said Court erred in affirming the refusal of the trial judge to charge appellant's sixth request to charge which was as follows:

"6. If the jury find that the coupler was such a coupler as would couple automatically by impact and was in order, then the plaintiff assumed the risk of his employment and the verdict must be for the defendant."

8. That said Court erred in affirming that part of the charge of the trial judge excepted to on behalf of appellant, which was as follows:

89 "I refuse to charge that, gentlemen, and submit that proposition to you as a jury question. That is for the jury to determine, but I have already stated, however, that in the matter of assumption of risk of course anything that was obvious to the plaintiff, that he might reasonably anticipate, was a risk that he assumed, providing the couplers were the sort of couplers, the character of couplers contemplated by the Act of Congress."

9. That said Court erred in affirming the refusal of the trial judge to charge appellant's seventh request to charge which was as follows:

"7. If the jury find from the evidence that the plaintiff could have reasonably anticipated the result of putting his hand on the coupler while the engine was coming back under signal, it was a

risk of his employment known to him which he assumed and the verdict must be for the defendant."

10. That said Court in affirming that part of the charge of the trial judge excepted to on behalf of appellant which was as follows:

"That is for you to say, whether or not providing the couplers were the sort of couplers provided for by the Act of Congress the plaintiff did not assume the risk himself, because he was an intelligent man and an experienced man. That, gentlemen, is a question for you to determine under all the facts and circumstances."

11. That said Court erred in affirming the action of the trial judge in leaving to the jury to determine, the question whether the cars of appellant were equipped with couplers coupling automatically by impact when there was no evidence that they were not so
90 equipped and it appeared from the evidence that they were so equipped.

12. The said Court erred in affirming rulings of the trial court above set forth which denied to the appellant rights and immunities to which it was entitled under the Federal Employers' Liability Act.

13. A title, right, privilege or immunity is claimed by the Atlantic City Railroad Company under a statute of the United States, and the decision of the New Jersey Court of Errors and Appeals is against the title, privilege or immunity so set up or claimed under such statute.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
Attorneys for Appellant.

Endorsed: "Filed Mar. 25, 1915. David S. Crater, Clerk."

91 Know all Men by these Presents, That we, Atlantic City Railroad Company a corporation of New Jersey as principal, and United States Fidelity and Guaranty Co. of Baltimore, Maryland, as surety, are held and firmly bound unto Lewis S. H. Parker of Mullica Hill in the County of Gloucester and State of New Jersey in the full and just sum of seven thousand dollars, to be paid to the said Lewis S. H. Parker his certain attorney, executors, administrators, or assigns: to which payment, well and truly to be made, we bind ourselves, and our successors, jointly and severally, by these presents. Sealed with our seals and dated this twenty-fourth day of March, in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a term of the Court of Errors and Appeals of the State of New Jersey in a suit depending in said Court, between Lewis S. H. Parker plaintiff respondent and said Atlantic City Railroad Company defendant appellant, said Court affirmed a judgment of New Jersey Supreme Court of three thousand dollars and costs which in said Supreme Court was rendered against the said Atlantic City Railroad Company and the said Atlantic City Railroad Company having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Lewis S. H. Parker cit-

ing and admonishing him to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date thereof.

Now, the condition of the above obligation is such, That if said Atlantic City Railroad Company shall prosecute said writ of error, to effect, and answer all damages and costs if it fail to make its plea good, then the bove obligation to be void; else to remain in full force and virtue.

92 ATLANTIC CITY RAILROAD COMPANY, [SEAL.]
By THEODORE VOORHEES, [SEAL.]
President.

[Corp. Seal.]

Attest:
GEO. ZIEGLER, *Secretary.* [SEAL.]
[Corp. Seal.]

UNITED STATES FIDELITY AND GUARANTY CO.,
By J. WALTER ZELBEY, *Res. Vice-Pres.*

Attest:
WINFIELD S. CALDWELL,
Resident Secretary.

Sealed and delivered in presence of
—— ——.

Approved by
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

93 United States Fidelity and Guaranty Company.

Capital Paid in Cash $2,000,000; Total Resources Over $8,750,000.

Home Office: Baltimore, Md.

Zebley & Strouse, Managers.
1315 Real Estate Trust Building, Philadelphia.

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

On this 24th day of March one thousand nine hundred and fifteen before me personally came J. Walter Zebley known to me to be the Resident Vice-President of the United States Fidelity and Guaranty Company, the corporation described in and which executed the annexed bond of Atlantic City Railroad Company as surety thereon, and who being by me duly sworn, deposes and says that he resides

in the City of Philadelphia, State of Pennsylvania; that he is the Resident Vice-President of the said United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; and the said Company has complied with the provisions of the Acts of Assembly of the State of New Jersey allowing certain corporations to be accepted as surety on bonds; that the seal affixed to the annexed bond of Atlantic City Railroad Co. is the corporate seal of the said United States Fidelity and Guaranty Company and was thereto affixed by order and authority of the Board of Directors of said Company; and that he signed his name thereto by like order and authority as Resident Vice-President of said Company; and that he is acquainted with Winfield S. Caldwell and knows him to be the Resident Secretary of said Company; and that the signature of said Winfied S. Caldwell subscribed to said bond is in the genuine handwriting of said Winfield S. Caldwell and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent.

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J. WALTER ZEBLEY,
Resident Vice-President.

Sworn and subscribed before me the day and year aforesaid.

[SEAL.] HOWARD C. REYNOLDS,
Notary Public.

Commission Expires February 21, 1919. Notary Public.

At a special meeting of the Board of Directors of the United States Fidelity and Guaranty Company, held at the office of the Company, in the City of Baltimore, State of Maryland, on the 29th day of October, A. D. 1914, at which was present a quorum of said Directors, duly authorized to act in the premises, on motion duly seconded, it was unanimously

Resolved, That J. Walter Zebley and Henry Strouse be, and they hereby are elected Resident Vice-Presidents of the Company, residing in Philadelphia, Pennsylvania, and Winfield S. Caldwell and Edward J. Fisher be, and they are hereby elected Resident Secretary and Resident Secretary pro-tem., respectively, of said Company, residing in Philadelphia, Pennsylvania, and either of said Resident Vice-Presidents be and they hereby are authorized and empowered to sign the name of the Company as surety to and to execute, acknowledge, justify upon and deliver any and all contracts guaranteeing the fidelity of persons holding positions of public or private trust, guaranteeing the performance of contracts other than insurance policies, and executing or guaranteeing bonds and undertakings required or permitted in all actions or proceedings or by law allowed, and

Also, to make, execute, seal and deliver all bonds or undertakings required under Chapter 282 of the Revised Statutes of the United States, entitled "An Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," passed August 13th, 1894, and

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Also, to affix the seal of the Company to any and all of said bonds or undertakings; said seal when so affixed to be attested in every instance by the said Winfield S. Caldwell, Resident Secretary, or Edward J. Fisher, Resident Secretary pro-tem.

Also, to countersign on behalf of said Company and as its representatives, all checks on deposit made subject to the counter-signature of a representative of said Company.

CITY AND COUNTY OF PHILADELPHIA, *ss:*

I, Winfield S. Caldwell, Resident Secretary of the United States Fidelity and Guaranty Company, having compared the foregoing resolution with the original thereof, as recorded in the Minute Book of said Company, do hereby certify that the same is a true and correct transcript therefrom, and of the whole of said original resolution.

Given under my hand and the seal of the Company, at the city of Philadelphia, this 24th day of March, 1915.

[Corp. Seal.]

WINFIELD S. CALDWELL,
Resident Secretary.

Endorsed: "Filed Mar. 29, 1915. David S. Crater, Clerk."

96 STATE OF NEW JERSEY:

New Jersey Court of Errors and Appeals.

I, Thomas F. Martin, Clerk of the Court of Errors and Appeals of the State of New Jersey, do hereby certify, That there was lodged with me, as such Clerk, in the case of Lewis S. H. Parker, Respondent, vs. Atlantic City Railroad Company, Appellant, on the twenty-ninth day of March, A. D. nineteen hundred and fifteen, the original Bond, of which a copy is herewith set forth, and that on the said twenty-ninth day of March, A. D. nineteen hundred and fifteen, there was lodged with me, as such Clerk, two copies of the writ of error, as herein set forth, one for the Respondent, and one for my office.

In testimony whereof, I have hereunto set my hand and affixed the Seal of the said Court, at my office, in Trenton, New Jersey, this tenth day of April, A. D. nineteen hundred and fifteen.

[Seal: The Earth is the Lord's and the Fullness Thereof.]

THOMAS F. MARTIN, *Clerk.*

97 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States to the Honorable Judges of the Court of Errors and Appeals of the State of New Jersey, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Errors and Appeals of the State of New Jersey, before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Lewis S. H. Parker, plaintiff-respondent and Atlantic City Railroad Company, defendant-appellant, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Atlantic City Railroad Company, as by its
98 complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the twentieth day of April next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the said Supreme Court, the twenty-third day of March, in the year of our Lord one thousand nine hundred and fifteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

Allowed by,
MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

99 [Endorsed:] United States Supreme Court. Atlantic City Railroad Company, plaintiff in error, v. Lewis S. H. Parker. Writ of error to New Jersey Court of Errors and Appeals. Returnable April 20th, 1915. Thomas E. French, Samuel H. Richards, Attys.

100 STATE OF NEW JERSEY:

New Jersey Court of Errors and Appeals.

LEWIS S. H. PARKER, Respondent,
vs.
ATLANTIC CITY RAILROAD COMPANY, Appellant.

I, Thomas F. Martin, Clerk of the Court of Errors and Appeals of the State of New Jersey, do hereby certify, That the above and foregoing is a full, true and correct transcript of the record in the above entitled cause.

And I further certify, That in pursuance with the writ of error heretofore filed in this case, I now herewith transmit said transcript, together with the original writ of error and the original citation, to the Supreme Court of the United States.

In testimony whereof, I have hereunto set my hand and affixed the Seal of said Court, at my office in Trenton, New Jersey, this tenth day of April, A. D. nineteen hundred and fifteen.

[Seal: The Earth is the Lord's and the Fullness Thereof.]

THOMAS F. MARTIN, *Clerk.*

101 UNITED STATES OF AMERICA, *ss:*

To Lewis S. H. Parker, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Errors and Appeals of the State of New Jersey wherein Atlantic City Railroad Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Mahlon Pitney, Associate Justice of the Supreme Court of the United States, this 26th day of March, in the year of our Lord one thousand nine hundred and fifteen.

MAHLON PITNEY,
Associate Justice of the Supreme Court of the United States.

102 [Endored:] United States Supreme Court. Atlantic City Railroad Company, Plaintiff in error, v. Lewis S. H. Parker. Citation. Thomas E. French, Samuel H. Richards, Att'ys. Due service of the within citation on Lewis S. H. Parker is hereby acknowledged to have been made. David O. Watkins, Att'y for Lewis S. H. Parker. 3/27/15.

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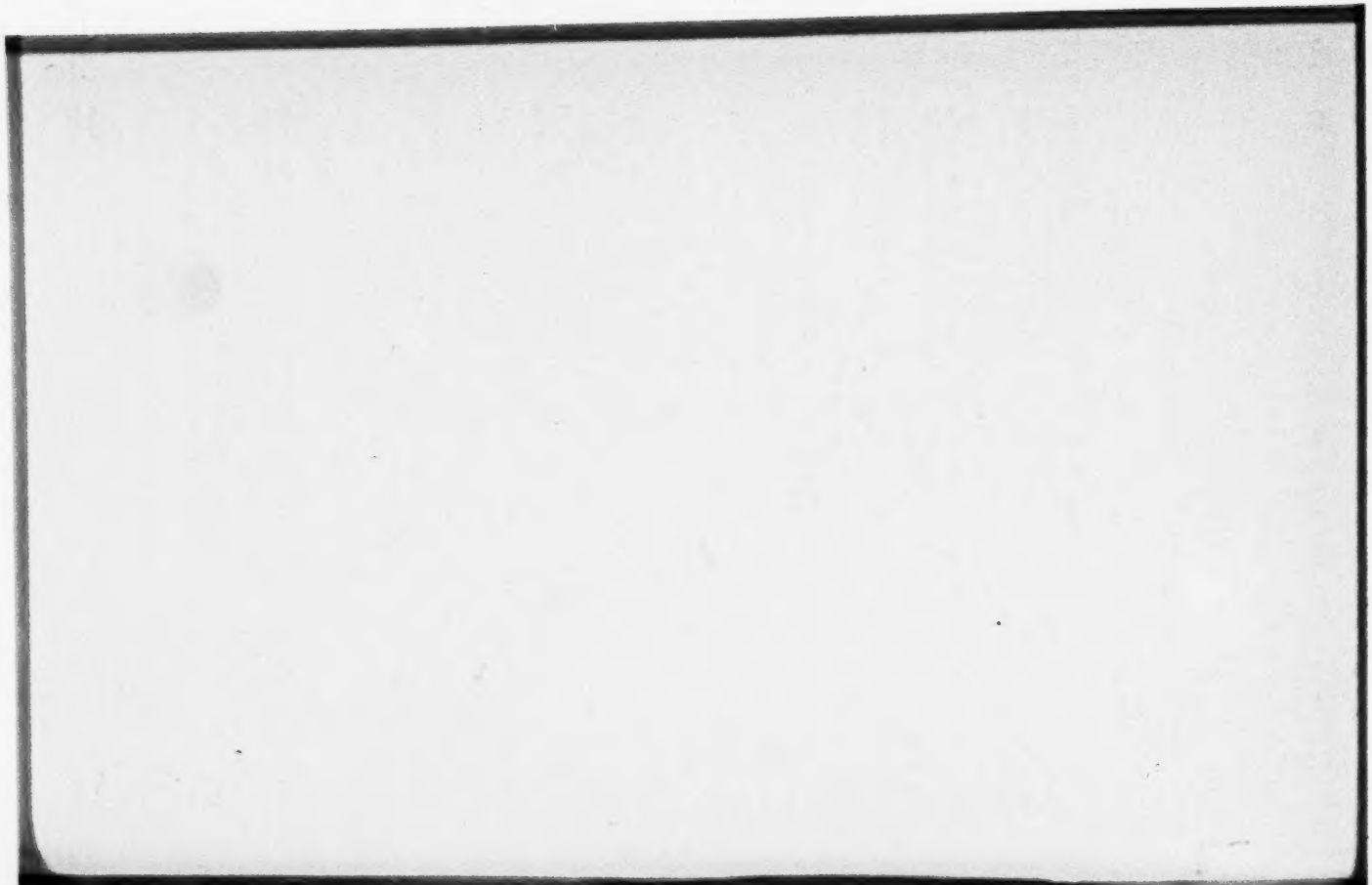

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 111.

ATLANTIC CITY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LEWIS S. H. PARKER.

BRIEF FOR THE PLAINTIFF IN ERROR.

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
CHARLES HEEBNER,
Counsel for Plaintiff in Error.

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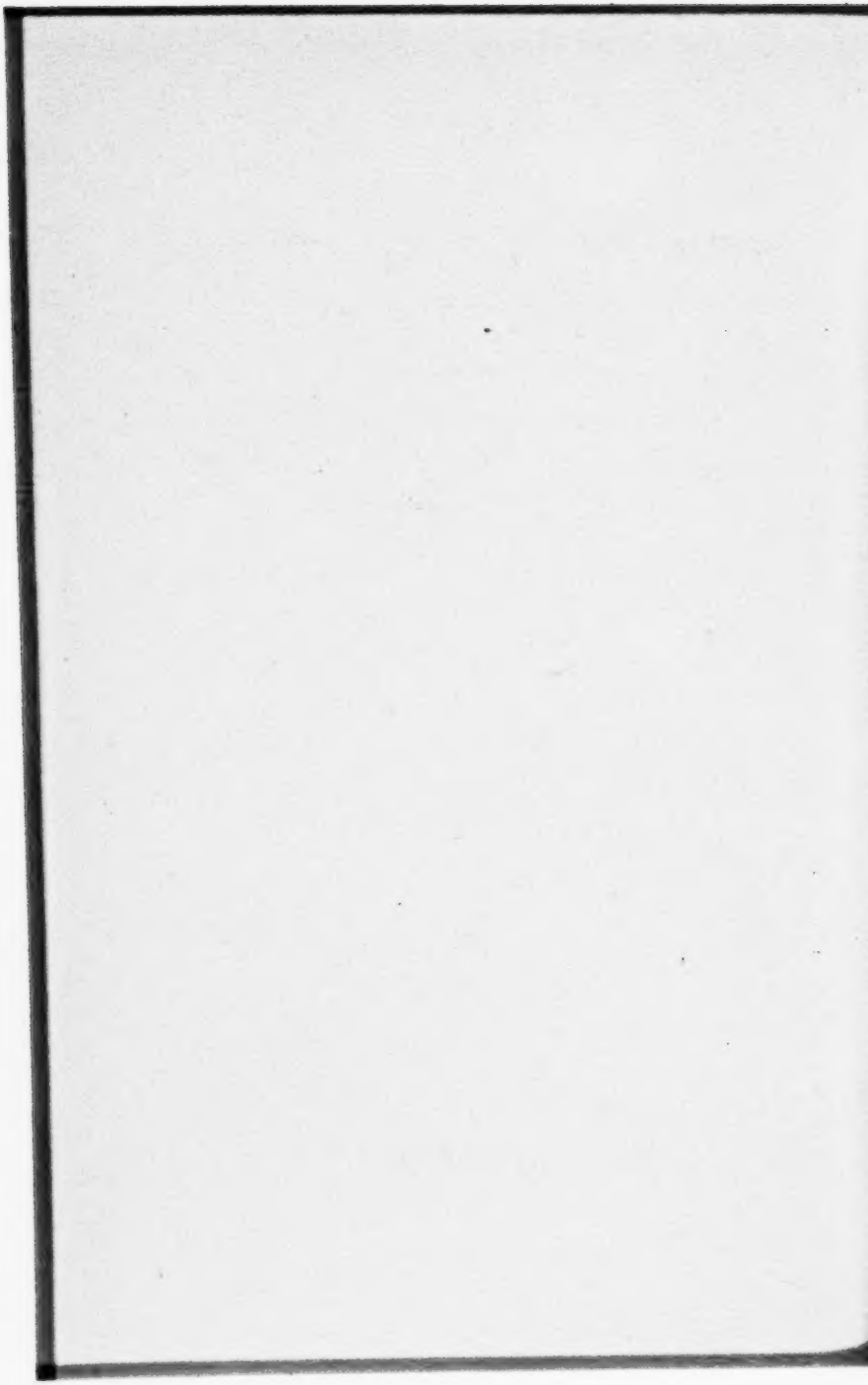

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ATLANTIC CITY RAILROAD COMPANY, PLAINTIFF IN ERROR,

vs.

LEWIS S. H. PARKER.

BRIEF FOR THE PLAINTIFF IN ERROR.

Statement of the Case.

This is a writ of error to the Court of Errors and Appeals of the State of New Jersey to review a judgment which affirmed a judgment of the New Jersey Supreme Court adjudging that the railroad company at the time of the accident was using couplers which, solely for the reason that when such couplers were not in line because the cars were on a curve, would not couple on the first effort to secure an impact, and therefore did not measure up to the standard prescribed by the Federal Safety Appliance Act, and adjudging that the company, although not otherwise negligent, must respond in damages for an injury to its employee.

Parker, the plaintiff in the court of first instance (and we shall here so designate him), was at the time of the injury a brakeman employed by the defendant, and as such was operating one of the defendant's trains engaged in interstate commerce. A car had just been taken from the train and placed upon a siding, and the engine was returning to the train. The plaintiff was directing the movement of the engine, and the engineer was obeying his every command.

The coupling of the engine to the train had to be performed on a curve, and as a consequence the couplers were not in line, and there was not on the first attempt the necessary impact to cause them to couple. The plaintiff, then, having signaled the engineer to come on, in violation of the rules, without changing his signals, pushed the drawhead on the car over to place it in line with the coupler on the tender, whereupon the couplers coupled automatically by impact, but in so doing caught and crushed the plaintiff's hand.

The condition of the couplers and the cause of the accident were disclosed by the plaintiff in his testimony as follows:

> "The Court: I want you to state how it was; state again how it was that the tender—you call it the tender—and the car would not meet in the coupling process; what was wrong about it?
>
> "The Witness: The drawhead on the car was pushed to one side so that it was not straight with the drawhead on the tender; it would not couple.
>
> "By the Court:
>
> "Q. Well, what caused it to be pushed to one side?
>
> "A. The curve, I suppose."
>
> Transcript of Record, at bottom of page 12 and at top of page 13.
>
> "Q. The coupler itself is part of what, the drawbar or the drawhead, isn't it?
>
> "A. Yes.
>
> "Q. That has a coupling attachment?

"A. Yes.

"Q. And that drawbar runs in under the car here and works on a pin or something so that it has a lateral movement from side to side?

"A. Yes.

"Q. Slight, not very much, is it?

"A. Why, quite a little, some of them.

"Q. Two or three inches or something of that kind?

"A. More than that.

"Q. Well, there is a movement from side to side?

"A. Yes.

"Q. And if the train is very much on a curve or if some one has pushed them to one side, the couplers do not meet?

"A. No.

"Q. But if they do meet they automatically couple, don't they?

"A. Yes, sir."

Transcript of Record, on page 13.

"Q. Then the difficulty was not with the coupler itself, but with the fact that the drawhead——

"A. Was pushed to one side.

"Q. Was pushed to one side, and you pushed the drawhead, or arranged the drawhead? Now, how did you arrange that drawhead? What did you do with the drawhead to make it in line with the coupler on the other car?

"A. I pushed it over this way.

"Q. You pushed the whole appliance over—you did nothing to this knuckle?

"A. No, sir."

Transcript of the Record, on page 14.

"By the Court:

"Q. Was there any way by which that coupling could have been done except in the way you did it?

"A. No way I could move the drawhead; no, sir.

"By Mr. French:

"Q. That is true of all coupling appliances, isn't it, of couplers, that the drawbars or drawheads have

to be somewhat in line in order that they will couple when they are opened?

"A. Oh, yes.

"Q. If that coupling was closed and the other coupling was also closed, they would not couple, would they?

"A. No, sir.

"Q. And in order to have them couple you would have to have one knuckle open?

"A. Yes.

"Q. And you would open that knuckle not by going between the cars, but by this cutting lever on the side?

"A. Yes, sir."

Transcript of Record, on page 14.

Supplementing the plaintiff's testimony, MORRAU, the conductor on the train, testified as follows:

"Q. Do you know whether the appliance, the coupling appliance on that car 4515 worked properly?

"A. It did.

"Q. Are there many or few kinds of couplers?

"A. There is many of them.

"Q. If in good order, do all those couplers couple automatically by impact?

"A. They do.

"Q. The coupler the model of which is before you is only the head of the drawbar, isn't it? That is only part of the drawbar?

"A. That is all.

"Q. And back of that is a long iron or steel part?

"A. Yes.

"Q. What do they call that part back?

"A. The neck.

"Q. And how is that neck fastened into the car?

"A. It is fastened in with springs and bolts.

"Q. And does that work from side to side?

"A. It does.

"Q. Could a train get around a curve unless those necks were so that they would work laterally?

"A. No, sir, they could not, not a sharp curve, it would raise the trucks off the track."

Transcript of Record, on page 21.

This being the undisputed testimony and there being no evidence that the defendant was negligent in any other respect, we asked first for a nonsuit, then for a directed verdict, and finally requested the court to charge various statements concerning the liability of the defendant in the circumstances, all of which were denied.

The Court of last resort in New Jersey assumed that these couplers would not couple automatically by impact, and affirmed the judgment. The question thus presented being peculiarly a Federal question and the rulings of the courts of the State having denied to the defendant rights and immunities to which it was entitled under a statute of the United States, the matter is brought here by writ of error.

Specification of Errors.

1. The said court erred in affirming the denial by the trial court of the motion to nonsuit.

2. The said court erred in affirming the refusal of the trial court to direct a verdict for Atlantic City Railroad Company.

3. The said court erred in affirming a finding of the trial court that Atlantic City Railroad Company did not provide its cars with couplers required by the Federal Safety Appliance Act when there was no evidence justifying such finding.

4. The said court erred in affirming that part of the charge of the trial judge excepted to on behalf of appellant, which is as follows:

> "The couplers were intended to couple automatically by impact, but they did not couple in this instance, and in order to make them couple plaintiff was required to fix them with his hands so they would couple."

5. The said court erred in affirming that part of the charge of the trial judge excepted to on behalf of appellant, which was as follows:

> "If you find that the couplers were not couplers coupling automatically by impact, which could be coupled without the necessity of men going between the ends of the cars, then the matter of contributory negligence will have nothing to do with the case; that feature of the case must be eliminated altogether; if the couplers were not the kind of couplers called for by this law, then you cannot take into consideration the question of the plaintiff's contributory negligence, because it wouldn't have anything to do with the case. The defendant in that event would have to pay all the damages. But if you find, upon the other hand, that the couplers were the kind of couplers called for by the law which I read to you, then you will have to consider the plaintiff's contributory negligence seriously."

6. That said court erred in affirming the action of the trial judge in leaving to the jury, over the objections of the appellant, the undisputed question whether the couplers with which the cars were equipped would couple automatically by impact.

7. That said court erred in affirming the refusal of the trial judge to charge appellant's sixth request to charge, which was as follows:

> "6. If the jury find that the coupler was such a coupler as would couple automatically by impact and was in order, then the plaintiff assumed the risk of his employment and the verdict must be for the defendant."

8. That said court erred in affirming that part of the charge of the trial judge excepted to on behalf of appellant, which was as follows:

"I refuse to charge that, gentlemen, and submit that proposition to you as a jury question. That is for the jury to determine, but I have already stated, however, that in the matter of assumption of risk of course anything that was obvious to the plaintiff, that he might reasonably anticipate, was a risk that he assumed, providing the couplers were the sort of couplers, the character of couplers contemplated by the act of Congress."

9. That said court erred in affirming the refusal of the trial judge to charge appellant's seventh request to charge, which was as follows:

"7. If the jury find from the evidence that the plaintiff could have reasonably anticipated the result of putting his hand on the coupler while the engine was coming back under signal, it was a risk of his employment known to him which he assumed and the verdict must be for the defendant."

10. That said court erred in affirming that part of the charge of the trial judge excepted to on behalf of appellant, which was as follows:

"That is for you to say, whether or not providing the couplers were the sort of couplers provided for by the act of Congress the plaintiff did not assume the risk himself, because he was an intelligent man and an experienced man. That, gentlemen, is a question for you to determine under all the facts and circumstances."

11. That said court erred in affirming the action of the trial judge in leaving to the jury to determine the question whether the cars of appellant were equipped with couplers coupling automatically by impact when there was no evidence that they were not so equipped, and it appeared from the evidence that they were so equipped.

12. The said court erred in affirming rulings of the trial court, above set forth, which denied to the appellant rights and immunities to which it was entitled under the Federal Employers' Liability Act.

13. A title, right, privilege, or immunity is claimed by the Atlantic City Railroad Company under a statute of the United States, and the decision of the New Jersey Court of Errors and Appeals is against the title, privilege, or immunity so set up or claimed under such statute.

Brief of the Argument.

1. The failure of the couplers to couple when the cars are on a curve and the couplers are not in line will not support a finding that the Safety Appliance Act has been violated.

2. The court should have granted a nonsuit.

3. The court should have directed a verdict for the defendant.

4. The court should not have left it to the jury to construe and determine the meaning of the Federal Safety Appliance Act.

5. The court should not have left to the jury the question whether the couplers would couple automatically by impact in the absence of any proof that they would not, and in the presence of proof that they would and did so couple.

6. The court should have charged the defendant's sixth request.

7. The court should have charged the defendant's seventh request.

ARGUMENT.

I.

THE FAILURE OF THE COUPLERS TO COUPLE WHEN THE CARS ARE ON A CURVE AND THE COUPLERS ARE NOT IN LINE WILL NOT SUPPORT A FINDING THAT THE SAFETY APPLIANCE ACT HAS BEEN VIOLATED.

The nearest approach to the instant case, among the decisions of this court, is the Wagner case, decided in June, 1916. There the plaintiff, a brakeman, stood on the footboard of the engine between the engine and car and placed his left foot against the knuckle of the coupler of the engine for the purpose of pushing it into position, when he lost his balance, slipped and fell, and his left foot was caught between the coupler and crushed. It appeared from the testimony that at the first impact the drawhead on the engine *was in line* with that on the box car and that the only thing that prevented the coupling at this time was the *failure of the pin on the box car to drop*. The court held this was testimony that the coupler was out of order and warranted the jury in finding that the couplers were in bad repair and for that reason did not measure up to the standard prescribed by the statute.

Mr. Justice Pitney, speaking for the court, in discussing this feature of the case, called particular attention to the fact that "the evidence of bad repair in the automatic equipment was not confined to the fact that the drawbar on the engine was out of line," and further said: "The jury could reasonably find that the misalignment of the drawbar was greater than required to permit the rounding of curves." He then especially disclaimed any intention to decide, and apparently reserved for future consideration the question which we now ask the court to determine. He said:

> *"We need not in this case determine,* what was conceded in Chicago, R. I. & P. R. Co. *vs.* Brown, 229 U. S., 317, 320, *that the failure of a coupler to work at any time sustains a charge that the act has been violated."*
>
> San Antonio & Aransas Pass Railway Co. *vs.* Wagner, 241 U. S., 476; 36 S. C. R., 626.

In the Parker case there was not only no evidence that the defendant could have provided any better or safer appliances, but the plaintiff frankly admitted that the couplers were not defective, that there was no other way in which a coupling could be made, and that in this respect all couplers were alike.

The question whether the statute requires the couplers to couple when the cars are on a curve and the couplers are consequently not in line and there can be no fair impact, has never, so far as we have been able to discover, been before this court, and the question being thus an open one the opinion of this court in the Baugham case, decided May 22, 1916, may aid us in reaching a proper determination of it.

> Baugham *vs.* N. Y., P. & N. R. Co., 241 U. S., 237; 36 S. C. R., 592.

The Baugham case dealt with the safety and security of the employee in the use of ladders, hand holds, and grab irons but it will be remembered that the statute requiring these appliances is the same statute which requires couplers that will couple automatically by impact. In that case there were four tracks on a barge. Where the cars entered the barge from the wharf there was sufficient space for an employee, moving between the tracks, to mount the cars in safety. These tracks gradually converged until the space between them so diminished that cars being moved on one center track would almost touch those standing on the other center track. The roofs of the cars would sometimes touch. The plaintiff's intestate while ascending a moving car was

caught between the cars and received injuries from which he died. This state of facts being established there was a demurrer to the evidence, the demurrer was sustained and this court affirmed the judgment entered thereon. One of the points made by the plaintiff was that "the convergence of the tracks on the barge was a defect or insufficiency due to the negligence of the company in its track, roadbed, barge, and equipment."

The feature of this case to which we call attention is that the ladders, hand-holds, and grab-irons were in good condition and in ordinary places were perfectly safe, but at the point in question on curved or converging tracks they ceased to be safe, and yet the company incurred no liability under the safety appliance act. Why may not couplers be treated in the same way? On a straight track they should be sufficiently in line to couple by impact, but on a curve we must not expect the impossible, and if on a curve by reason of their being out of line the first effort to secure an impact is a failure, this of itself is no evidence from which a jury can be permitted to say that the couplers were out of order or did not measure up to the standard required by the statute.

The Parker case is readily distinguishable from the Brown case.

> St. Louis & S. F. R. Co. *vs.* Brown, 241 U. S., 223; 36 S. C. R., 604.

There, as here, the plaintiff was directing the movements of the engine, but here the engineer obeyed the plaintiff's signals and commands implicitly, while the Brown engineer disobeyed. He was given by Brown a "spot" signal, which indicated that he was not to move the engine until a further signal. The engineer disregarded the "spot" signal, with the result that Brown was caught and crushed. The trial court held that the plaintiff did not assume the risks that were attendant upon the negligence of a fellow-servant, and this court affirmed the judgment.

Here the couplers were the best known devices and there was no negligence on the part of the engineer. Parker knew the couplers would couple automatically by impact, but knew also that there was a curve in the tracks and it might require more than one effort to get the necessary impact. He signaled the engineer to come on; the engineer obeyed, and Parker then, without changing the signals, deliberately placed his hand between the couplers; the couplers coupled automatically by impact, and his hand was thereby crushed.

A case which, while it did not arise on a curve, still deserves attention, is the Morris case, decided by the Court of Civil Appeals of Texas.

Morris *vs.* St. Louis S. W. Ry. Co., 158 S. W., 1055.

The Morris case is in harmony with and was decided by the same court as the Wagner case, and this court affirmed the judgment in the Wagner case.

In the Morris case the plaintiff at the time the accident occurred was standing on the footboard of the engine. His account of the accident was as follows:

> "I was trying to couple an engine into this flat car, and the first time we hit it, trying to make a coupling the couplings didn't meet, and then I pulled the drawbar over to me as far as I could and thought it was over far enough to meet, and I gave the engineer a signal to come ahead, and just before we got to the flat car I saw that the draw bar on the car was over towards me, as far over as it would go, and I kicked the drawbar on the flat car as far as I could and the knuckle on the engine caught the sole of my shoe and dragged the foot into the coupling."

On his cross-examination he testified:

> "There is some play in the couplers; if they didn't have any play they could not go around curves. They have got to be adjusted on every car on the road, and they have got to be adjusted from time to time in order to make them couple. Yes, sir; in every car, whether it is in good condition or otherwise."

The court, in commenting on this, said:

> "It is plain, we think, that the testimony recited did not show, nor in the least tend to show (and there is none in the record before us which did), that appellee had failed to comply with the requirement of either the Federal or State statute. On the contrary it appeared that the engine and car were equipped with couplers which, notwithstanding a defect in the one on the car, *if properly adjusted for the purpose would couple automatically by impact.* It did not appear that in order to so adjust the couplers it was necessary for some one to go between the ends of the engine and car. For aught appearing in the record to the contrary, the couplers could have been so adjusted by the manipulation of rods or levers or otherwise, by a person standing entirely from between the ends of the engine and car. If they could have been so adjusted it is clear appellee had not violated either of the statutes, and that appellant was not entitled to recover on the ground that it had. The burden being on appellant to prove such a violation, and he having failed to do so, the trial court did not err in peremptorily instructing the jury to find for appellee."

We submit that Congress did not intend to require the impossible, and that the only fair and reasonable construction of the statute is that it does not require couplers that on a curve when they are not in line, will without assistance couple on the first effort to secure an impact.

II.

THE COURT SHOULD HAVE GRANTED A NONSUIT.

The plaintiff was himself directing the movements of the engine, and consequently there could be no negligence of the defendant in that respect. Moreover, as we have above indicated, the failure to couple on a curve was not a violation of the safety appliance act, and it appearing by positive

evidence that the couplers were otherwise perfect a motion was made to nonsuit the plaintiff.

Under the practice in New Jersey, it is reversible error to deny a motion to nonsuit where the plaintiff fails to establish by proof an essential part of his case.

Kelly *vs.* Central R. R. Co., 70 N. J. L., 190.
Orr *vs.* Metropolitan, 77 N. J. L., 749, 753.

If this court agrees with us and finds that the failure to couple on a curve, without impact when the couplers were not in line, was not a violation of the statute, the denial of the motion to nonsuit becomes reversible error.

III.

THE COURT SHOULD HAVE DIRECTED A VERDICT FOR THE DEFENDANT.

What we have said concerning the motion to nonsuit applies also to the motion to direct a verdict, and we may add that all courts, State and Federal, recognize the right to a directed verdict in such circumstances, even where it is held that a nonsuit is within the discretion of the court.

IV.

THE COURT SHOULD NOT HAVE LEFT IT TO THE JURY TO CONSTRUE AND DETERMINE THE MEANING OF THE FEDERAL SAFETY APPLIANCE ACT.

The real question in the case was whether Congress intended to require couplers that would couple on a curve without proper impact. The trial judge read to the jury portions of the statute.

Transcript of Record, pages 39, 40, and 41.

He then left to the jury the meaning and construction of this act by the following instructions:

> "In the consideration of this case you are to determine *whether a case of negligence has been made out against the defendant within the provisions of the law* which I read to you."
>
> Transcript of Record, page 40.

> "If you find that the couplers were not couplers coupling automatically by impact, which could be coupled without the necessity of men going between the ends of the cars, then the matter of contributory negligence will have nothing to do with the case; that feature of the case must be eliminated altogether; if the couplers were not the kind of couplers called for by this law, then you cannot take into consideration the question of the plaintiff's contributory negligence, because it wouldn't have anything to do with the case. The defendant in that event would have to pay all the damages. But *if you find*, upon the other hand, that *the couplers were the kind of couplers called for by the law* which I read to you, then you will have to consider the plaintiff's contributory negligence seriously."
>
> Transcript of Record, page 41.

In dealing with the sixth and seventh requests he again left it to the jury to say whether the couplers were the sort of couplers contemplated by the act of Congress.

Transcript of Record, page 42.

The proper construction of a statute is a question for the court, and should not be submitted to the jury.

36 Cyc., 1102.

Whether the statute requires couplers that will couple automatically on a curve when the couplers are not in line is a court and not a jury question, and the submission of this question to the jury was an abdication by the court of its powers and a failure to perform its duties.

V.

THE COURT SHOULD NOT HAVE LEFT TO THE JURY THE QUESTION WHETHER THE COUPLERS WOULD COUPLE AUTOMATICALLY BY IMPACT IN THE ABSENCE OF ANY PROOF THAT THEY WOULD NOT AND IN THE PRESENCE OF PROOF THAT THEY WOULD AND DID SO COUPLE.

The trial judge at the beginning of his charge said:

> "The couplers were intended to couple automatically by impact, but they did not couple in this instance."
>
> Transcript of Record, page 39.

When an exception was taken to this he made the additional statement:

> "I wish to say to you, gentlemen of the jury, that the court did not intend to say as a fact that the couplers did not work. What the court meant was that the contention of the plaintiff was that they did not work, so that he was required to adjust them with his hands. That is the plaintiff's contention in this case, but whether or not that is a fact is a jury question."
>
> Transcript of Record, page 43.

This statement was also excepted to because of the absence of proof that they would not couple and the presence of proof that they would and did couple.

Transcript of Record, page 43.

As we have already seen, the plaintiff did not even contend that the couplers would not couple automatically by impact. On the contrary, he frankly admitted that they would so couple and that the only reason they did not upon the first attempt in this instance was that they were not in line because the train was on a curve.

Transcript of Record, pages 12, 13, and 14.

There was clearly nothing to go to the jury in this respect, and by permitting the jury to set thereon a Federal right has been denied as the result of a finding of fact which is without support in the evidence.

Southern Pac. Co. vs Schuyler, 227 U. S., 601; 33 Sup. Ct. Rep., 299.

VI.

The court above was reversed for refusing plaintiff's sixth request.

The request was in these words:

> "If the jury find that the engine was such a coupler as would couple automatically by impact and was in order, then the plaintiff assumed the risk of his employment and the verdict must be for the defendant."
>
> Transcript of Record, page 45.

The judge had already charged:

> "There is evidence in the case, and evidence that has not been disputed, that it was the duty of the plaintiff before attempting to adjust those couplers with his hands to stop that locomotive engine. If he went in there between the cars while that train was in motion, it is a serious question whether he action is not barred by contributory negligence."
>
> Transcript of Record, page 45.

If we assume that the jury could pass upon the sufficiency of the couplers at all, it was manifestly the duty of the judge to charge the sixth request, and the submission to the jury of the question whether the plaintiff assumed the risk was reversible error.

VII.

THE COURT SHOULD HAVE CHARGED THE DEFENDANT'S SEVENTH REQUEST.

This is the language of the request:

> "If the jury find from the evidence that the plaintiff could have reasonably anticipated the result of putting his hand on the coupler while the engine was coming back under signal, it was a risk of his employment known to him which he assumed and the verdict must be for the defendant."
>
> Transcript of Record, page 42.

What we have said concerning the sixth request applies also to this. The law respecting assumption of risk is to be declared by the court and not by the jury.

VIII.

Conclusion.

For all or for some of the reasons above set forth, the affirmance by the New Jersey Court of Errors and Appeals of the judgment in favor of the plaintiff was reversible error, and the judgment of that court, as well as the judgment of the New Jersey Supreme Court, should be reversed.

All of which is respectfully submitted,

THOMAS E. FRENCH,
SAMUEL H. RICHARDS,
CHARLES HEEBNER,
Counsel for Plaintiff in Error.

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JAMES D. MAH
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NO. 111 OCTOBER TERM, 1916

IN THE

Supreme Court of the United States

ATLANTIC CITY RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

LEWIS S. H. PARKER,
Defendant-in-Error.

In Error to the Court of Errors and Appeals of the State of New Jersey.

BRIEF OF DEFENDANT-IN-ERROR

DAVID O. WATKINS,
Counsel for Lewis S. H. Parker, Defendant-in-Error.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915. No. 435.

ATLANTIC CITY RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

LEWIS S. H. PARKER,
Defendant-in-Error.

BRIEF FOR DEFENDANT-IN-ERROR.

I.

This action was tried at the Gloucester County, New Jersey, Circuit Court, at the May Term, 1914, and a verdict rendered by the jury in favor of the plaintiff for the sum of $3,000.00, and judgment afterwards affirmed by unanimous vote of the Court of Errors and Appeals of New Jersey.

The injury to plaintiff occurred in November of 1912. The plaintiff was a brakeman, employed by the defendant, admittedly engaged at the time in interstate commerce, and while coupling an engine to a car, which was part of his work, owing to the fact that the coupler would not work, he was com-

pelled to insert his arm between the engine and car and his arm was crushed, and as a result thereof was amputated.

This action is brought under the Act of Congress of the United States entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases," approved April 22nd, 1908, further amended by an Act of Congress entitled "An Act to amend an Act entitled 'An Act relating to the liability of common carriers by railroad to their employees in certain cases, approved April 22nd, 1908,' " which amendment was approved April 5th, 1910. The Act in question is commonly referred to as "The Federal Employers' Liability Act."

The Act of Congress designated as "The Safety Appliance Act" approved March 2nd, 1893, and amended, but in no way amending the part in question, is entitled "An Act to promote the safety of employees and travelers upon railroads by compelling common carriers engaged in interstate commerce, to equip their cars with automatic couplers and continuous brakes and their locomotives, with driving-wheel brakes, and for other purposes." Section 2 of this Act provides "That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

The Act referred to as "The Employers' Liability Act" provides that every common carrier by railroad while engaging in commerce, etc., shall be

liable in damages to any person suffering injury while he is employed by such carrier in such commerce, etc., for which injury resulting in whole or *in part* from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or *insufficiency*, due to its negligence in its cars, engines, appliances, machinery, tracks, etc., and by Section 3 of the said Act, it further provides that "In all actions hereafter brought against any such common carrier by railroad, under the provisions of this Act to recover damages for personal injuries, etc., *the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee; provided* that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by said common carrier of any statute enacted for the safety of employees contributed to the injury or death of the employee."

Section 4 further provides "that in any action brought against a common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee," and the amendment to the said Act referred to provides "that under this Act, the jurisdiction of the Courts of the United States shall be concurrent with that of the Courts of the several States, and no case arising under this Act and brought in any State court of competent jurisdiction shall be removed to any court of the United States."

that Congress contemplating hardship of such injuries, and hoping to diminish the economic loss, should impose their burden upon those who could measurably control their causes, instead of upon those who are in the main helpless in this regard."

"Under the Safety Appliance Acts of March 2nd, 1893, Chapter 196, 27th Statute, 531, April 1st, 1896, Chapter 87, 29th Statute, 85, and March 2nd, 1903, Chapter 976, 32nd Statute, 943, there is imposed an *absolute duty* on the carrier, and the penalty cannot be escaped by exercise of reasonable care."

C. B. & Q. Rwy. Co. vs. U. S., 220 U. S. Reports, 559.

And *St. Louis & Iron Mountain Rwy. Co. vs. Taylor*, above referred to, is upheld and quoted.

Justice Harlan, in the *C. B. & Q. Rwy. vs. U. S. case, Ibid*, says:

"It was held by us, and in our opinion it was necessarily held by the Supreme Court of the United States in the Taylor case, that the duty of railroads under the statute in question is an *absolute duty and not one which is discharged by the exercise of reasonable care and diligence.* The Court says this view has been upheld in

C. M. & St. P. Rwy. Co. vs. U. S., 165 Fed. Rep. 423, and

A. C. L. R. R. Co. vs. U. S., 168 Fed. Rep. 175.

in which latter case a complete review of the cases was made. Held, 'That Courts do not possess the power to read an exception into a statute so as to modify or change the nature of

the same and thus defeat the purposes for which the law was intended. It has been policy of our law-makers to grant railroads certain privileges not enjoyed by private individuals, and it is proper that due regard should be had for the rights of those necessarily engaged in performing the dangerous duties of operation; and it cannot be said to be an unreasonable provision to require railroad companies to manage and operate their engines and cars so as to minimize the risk incident to travel and employment.' "

This case, commenting on the Taylor case, said:

"It is also decided that non-performance of that duty could not be evaded or excused by proof that the corporation had used ordinary care in the selection of proper couplers or reasonable diligence in using them, etc."

Taylor case pertained to defective draw bars and this case to couplers held no difference in this fact.

The case is for a penalty and Taylor case for damages. Held: Violation of one is violation of other.

Justice Harlan further says: "If Taylor case was wrong, Congress must remedy."

That the Act is mandatory that the provisions of the Safety Appliance Act be fulfilled.

See

Wabash R. Co. vs. U. S., 168 F. 1;
Chicago Junction Rwy. Co. vs. King, 169 F. 372;
Wabash R. R. Co. vs. U. S., 172 F. 864;
Johnson vs. Great Northern Rwy. Co., 178 F. 643.

The first question, therefore, is: Was the above

company negligent as defined by this Act, such negligence being upon the part of any of its officers, agents or employees, or was there any defect or *insufficiency*, due to its negligence in its cars, engines, etc., for failure to provide the sufficient and necessary automatic couplers as required by the Safety Appliance Act?

The Safety Appliance Act above referred to means something. It does not mean a coupler that will sometimes work and sometimes will not, nor does it mean a coupler so placed and arranged upon a car that it will not always perform its work, but under certain circumstances will fail to do so. It is submitted that it is an *absolute duty* upon the part of the defendant company to provide a coupler which will couple the cars without the necessity of a man going in between the cars to do the work or to assist in doing it. The coupler is attached, as appears by the evidence, to a part of the car designated as drawhead. This all goes to make a complete coupler. Under the decisions quoted above of the United States Supreme Court, it was the *absolute duty* to provide a coupler required by the Act. Failure to do so is, in itself, negligence, in case of an injury resulting such as the one in question.

The principal question, therefore, in this case, and the controlling question is: Was this car, admittedly engaged in interstate commerce, furnished or provided with such a coupler and did it couple automatically by impact without the necessity of plaintiff going between the ends of the cars?

Mr. Parker, the plaintiff, testifies (page 7) that the engine would not couple to the car and he slid in to push the drawhead over; that the drawhead on the tender and the drawhead on the car were not

straight so that they would, when they came together, couple; and the engine and car would not have coupled without he had put his arm in as stated, and also page 14, in answer to a question by the Court, he says there was no way by which the coupling could have been done except in the way he did it.

The situation of the car, as it was left in the train, so uncoupled originally, was such that the drawhead was left out of line (testimony of Moreau, defendant's witness, pages 23, 24 and 25), and the same witness says that it is necessary to move the drawheads so that the couplers would work when the train was left on a curve, and the testimony in this case is, by all hands, that the train was left on a curve at the time it was uncoupled.

The defendant seems to try to draw a distinction between the drawhead and the coupler, but this cannot be done, because the coupler was fastened to the drawhead and, of course, unless the drawhead was moved over the coupler would not couple.

The testimony of the plaintiff shows negligence upon the part of railroad first in the employees of the railroad company in leaving the uncoupled train in such a position that the couplers would not work when they attempted to again couple up. Secondly, that the coupler was insufficient to perform the duties it was intended to do, that is to couple automatically when the engine backed into the car, and it is no excuse to say that the coupler would have worked if the car had been upon a straight track. That limits its sufficiency to certain positions of the car, and the United States Supreme Court has held as follows:

> "Under the Safety Appliance Acts, the failure of a coupler to *work at any time* sustains a charge of negligence upon the part of the carrier."

Chicago, Rock Island & Pacific Rwy. Co. vs. Brown, 229 U. S. Reports, 317.

That case is so analogous to the one in question that we quote the entire syllabus as follows:

"CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY VS. BROWN.

Error to the Circuit Court of Appeals for the Seventh Circuit.

No. 230. Argued April 18, 1913.—Decided June 10, 1913. Where the case is within the class which it was the purpose of the Judiciary Act of 1891 to submit to the final jurisdiction of the Circuit Court of Appeals, this Court goes no further than to inquire whether plain error is made out. *Texas & Pacific Railway vs. Howell*, 224 U. S. 577.

Under the Safety Appliance Acts the failure of a coupler to work at any time sustains a charge of negligence on the part of the carrier. *C. B. & Q. R. R. Co. vs. United States*, 220 U. S. 559.

Where the trial Court and the Circuit Court of Appeals have, after considering the evidence, confirmed the verdict, this Court will hesitate to say that their concurring judgments are not such as could be reasonably formed or are without foundation as matter of law.

One obliged to form a judgment in an emergency on the spot is not to be held accountable in the same measure as one able to judge the situation in cold abstraction. The Germanic, 196 U. S. 589.

The movement of trains requires prompt action, and one engaged therein should not be held guilty of contributory negligence because he did not anticipate that he might be injured if he selected one of several ways of performing his duty, even though

he had knowledge of the existence of that which caused his injury.

185 Fed. Rep. 80, affirmed.

The facts, which involve the construction of the Safety Appliance Acts and determination of what constitutes contributory negligence on the part of a switchman in a railway yard, are stated in opinion.

The action was brought in the State court and removed on the petition of the railway company to the Federal Court.

In this case, this Court said further as follows:

'This first count charging the failure I have just referred to is based upon the Act of Congress imposing certain requirements upon common carriers engaged in interstate commerce, and this statute provides that a carrier so engaged shall not move or permit to be moved on its rails a car that is used in interstate commerce unless equipped. This Act also provides that if an employee engaged in the service of such a carrier sustains an injury by reason of the carrier's failure to obey that law, the employe shall not be held to have assumed the risk of danger or injury resulting from such failure on the part of the carrier. It is also the law, having in mind still this first count, that if the employe goes between the cars to effect an uncoupling, he is not chargeable with contributory negligence, that is, a failure to exercise ordinary care for his own safety, by the mere fact of going in between the cars to effect the uncoupling, but he is required before he can recover to exercise ordinary care for his own safety after he goes between the cars and while he is there endeavoring to effect an uncoupling, that is, the separation of the cars.'

The counsel for the company at the outset expressed their realization that this case is one of those

characterized in *Chicago Junction Railroad Company* vs. *King*, 222 U. S. 222, as of the class which it was the purpose of the Judiciary Act of March 3, 1891, 26 Stat. 826, c. 517, to submit to the final jurisdiction of the Circuit Court of Appeals, and that this Court under such circumstances will 'go no further than to inquire whether plain error in made out.' *Texas & Pacific Ry. Co.* vs. *Howell*, 224 U. S. 577. And the concession is made that in the *Taylor Case*, 210 U. S. 281, and in *C., B. & Q. R. R. Co.*, vs. *United States*, 220 U. S. 559, *this Court settled that the failure of a coupler to work at any time, sustains a charge of negligence in this respect, no matter how slight the pull on the coupling lever.* And, further, 'The mere fact that the pin would not lift when plaintiff (Brown) endeavored to lift it makes a case of negligence under the first count.' Contributory negligence is asserted because Brown knew, as it is contended, that he would have to pass over an unbridled guard rail; that, besides, he controlled the situation, it is contended, through signals to the engineer, and that he had two safe methods in which to make the cut of the cars, but voluntarily and for his own purpose chose the most dangerous method.

But all these facts and how far they should have affected his conduct were submitted to the jury. The evidence detailed the situation to them and whether the judgment of Brown was prudently formed and exercised.

The trial Court and the Circuit Court of Appeals, considering the evidence, confirmed the finding of the jury expressed by its verdict. It would be going far to say that these concurring judgments are not such as could be reasonably formed, but such as must be pronounced to be without foundation as a matter of law.

The railway company starts in contentions with

the exercise of its own culpability in sending Brown in his duty to examine defective appliances and then seeks to relieve itself from liability by a charge against him of a careless judgment in its execution. But some judgment was necessary, and whether he should have selected one of the ways which counsel point out admits of debate. It is one thing to judge of a situation in cold abstraction, another thing to form a judgment on the spot. The Germanic, 196 U. S. 589, 595, 596. The movement of trains requires prompt action, and we cannot hold that as a matter of law, Brown, in leaning forward to remove a pin which could have yielded to his effort, was guilty of negligence because he did not anticipate that his foot might slip and he sought to an open fire out of which he had or could be charged with knowledge. The case is within the ruling in Texas & Pac. Ry. Co. vs. Barrey, 208 U. S. 113.

Judgment affirmed.[1]

See also

Hill vs. St. Louis & San Francisco R. R., 239 U. S. Reports, p. 208.

In this case the chain connecting the connecting lever to the lock pin on lock block was disconnected, owing to a break in the lock pin on lock block. The fireman had also had a lateral motion of four inches. Plaintiff undertook to hold down his lever with his foot so that the two couplers would might be coupled. In so doing he was injured.

Held: Carrier is not bound only to the extent of its best endeavors, but is subject to an absolute duty to provide and keep proper couplers at all times and under all circumstances.

See

U. S. vs. Illinois Cent. R. R. Co., 237 Fed. Rep.

Atchison, Topeka & S. F. R. Co. vs. [illegible]

> "A car equipped with automatic couplers, etc., but which apparatus is rendered wholly inoperative because the car is loaded with lumber projecting over the uncoupling lever so as to prevent its operation in the movement of the train, cannot be held to be a car equipped in compliance with the Safety Appliance Act."

Leaving car on curve renders apparatus equally as useless.

Johnson vs. Southern R. R. Co., 196 U. S. 1.

Here both cars were provided with automatic couplers, but they were of different types and would not couple automatically by impact.

Held: Not in compliance with the Safety Appliance Act.

Norfolk & W. R. R. Co. vs. Hazelrigg, 184 Fed. 828.

> "Evidence of the use of such cars with couplers so defective that they could not be coupled without going between them, and in doing so, plaintiff was injured, is sufficient to make a *prima facie* case, although it does not show the precise nature of the defect."

And where the attempt was made to assert contributory negligence upon the part of the employee in the above case, the Court also held in the *C. R. I. H. R. R. vs. Brown, Ibid:* "One obliged to form a judgment in an emergency on the spot is not to be held accountable in the same measure as one able to judge the situation in cold abstraction." So that we have the testimony of the plaintiff below showing negligence clearly and conclusively under this opinion of the Supreme Court. He is corroborated by all the witnesses of the defendant.

I have referred to a part of Moreau's testimony above, and further (on page 24) Moreau testifies that it was necessary, in this case, for Parker to push the drawhead so as to make the coupling. (On page 25) Moreau also stated that the drawheads coupling on a curve, without setting, will sometimes couple and sometimes will not and it is undisputed that this car was upon a curve. Further (on page 25) the same witness says that it is sometimes necessary, on any curve, to set the drawhead as this plaintiff attempted to do, and (on page 25) in answer to the question, 'But when the car is in such a position that the brakeman has to shove the drawhead over to make the coupling work, the coupling would not work automatically unless he did shove it over, would it?" Answer, *"No."*

George S. Eldredge, the engineer, a witness for the defendant (page 27), says the car was left upon a slight curve and (on page 27) gives the significant testimony, in answer to the question, "State what you saw and what happened." Answer, "Why, he gave me the signal to come back and couple up to this car; then about ten feet, I suppose, before he got to the car he jumped off on the ground and we came back and hit the car, *but the car did not couple and when we hit the car, it jarred away from the tender, I suppose, about that far, and the minute it opened up Lewis ran in there and shoved the drawhead over, which he claimed was not straight, etc., etc.,"* and again (page 28), said that Parker went in between the cars to push the drawhead over so it would couple.

Elmer J. Hurd, a witness for the defendant (page 29), states that "When the engine came back to couple with the car, the engine hit it and the car kind of bounded off a little, we didn't couple right

away. Mr. Parker jumped in and as he did, we came in and caught him, etc."

Henry V. Datz, Jr. (page 34), testifies that he had done the same in other cases as Mr. Parker did, that is, put in his hand to push the drawhead over when the coupling would not work, and (pages 34 and 35) he states "That it is a common thing for brakemen to set the knuckle in coupling cars; that they have to do it. And when the train backs and hits and it don't couple, the brakeman puts his hand in there and pushes it over so it will couple."

Now, it seems to me conclusively that this coupler was not the kind required by the Act of Congress, because the evidence shows conclusively that it did not work at the time of the attempted coupling and the attempt to show the contributory negligence upon the part of Parker has nothing to do with the feature of the case as to negligence upon the part of the railroad company.

All in any event that the contributory negligence could refer to would be to lessening the amount of damages which was to be done by the jury and not by the Court, in proportion to the amount of negligence attributable to such employee. Having before shown that the duty is an *absolute* one upon the part of the railroad company to provide couplers which will perform their work without any assistance from brakemen, and that the coupler in this case would not do it, the question of contributory negligence enters into the case not at all, excepting possibly for the purpose of diminishing damages, and this was fully gone into and explained by the Court to the jury and was entirely a jury matter, but it is maintained by plaintiff that contributory negligence is out of the case altogether owing to the defective or insufficient coupler.

The doctrine of obvious risk, which is referred to so often by the plaintiff-in-error, is out of the case, because the common carrier violated the Safety Appliance Act by not furnishing a proper coupler.

The Judge charged the jury very carefully and a reading of the charge will satisfy the Court that there is nothing in his charge for the company to complain of.

At the close of the plaintiff's case, the trial Court could not grant the motion for a non-suit because negligence had been proven.

The trial Court could not grant the motion to direct a verdict for the defendant at the trial, because, as I have shown, its negligence had been proven and the matter of contributory negligence was left to the jury, as required by the Act, and obvious risk was completely out of the case.

The defendant below seems to have tried the case upon the same theory that a suit would be tried for damages under the common law and the ordinary action of this kind tried in our State courts, overlooking the fact that it was tried solely and purely under the statutory requirements and regulations of interstate commerce and could not have been tried in our State courts at all, excepting by reason of the amendment which gave the State courts concurrent jurisdiction with the United States courts.

The third reason for appeal, referring to the Court's charge to the jury, is entirely proper under the evidence in this case that couplers were intended to couple automatically by impact, but they did not couple in this instance, and in order to make them couple, the plaintiff was required to fix them with his hand so they would couple. There is no dispute as to this point that I can find in the evidence.

As to the fourth and fifth reasons, we fail to find

anything therein which is contrary to law or contrary to the evidence.

The Court was justified in refusing to charge the request mentioned in the sixth reason *because the coupler was required, under the statute, to be a coupler which would automatically couple under all circumstances,* and it was up to the jury to find whether the couplers were the sort of couplers contemplated by the Act of Congress, or rather whether they would couple automatically or not.

The seventh reason given as to the charge of the Court, we can find nothing in it harmful to the defendant company.

The eighth reason advanced falls, because the risk of the employment had nothing to do with the case, for the couplers were not the sort of couplers demanded by the Act of Congress, the statute expressly makes such provision.

The same will apply to the ninth reason.

As to the tenth reason, plaintiff below states that there was evidence, both upon the part of the plaintiff below and admitted by the defendant company, that the couplers did not work at the time of the injury and did not couple without the insertion of the hand of Mr. Parker.

As to the other reasons given, we can find nothing excepting the bare propositions without any substantial grounds therefor.

We contend that the fact that the couplers may have worked under other circumstances prior to the accident, and the fact that they worked after the accident under certain other circumstances, and that they coupled the car after the drawhead was shoved over so that they would connect when the plaintiff inserted his arm therein, did not alter or disturb the substantial evidence that they did not work at the

time of the accident, and would not until after plaintiff below had taken the action he did.

In *Dilk vs. St. L. & San Francisco R. R. Co.*, 220 U. S. Reports, page 587, the Court further said:

> "Where a cause fairly depends upon weight or effect of the testimony, it is one for the consideration and determination of the jury under proper instruction as to principle of law involved."

There are some drawheads not necessary to shove over so that couplers will work, except on a very bad curve (Moreau's testimony, page 23). The curve in this case was a slight one and the couplers would not work without the assistance of plaintiff.

The Safety Appliance Act means that the car must be equipped with automatic couplers, whereby it can be *coupled or uncoupled* without the necessity of men going between the ends of the cars.

> *St. Louis & San Francisco R. R. Co. vs. Conarty, Admx.*, 238 U. S. Reports, page 243;

And in

> *Johnson vs. Southern Pacific R. R. Co.*, 196 U. S. Reports, page 19,

this Court said of the provisions for automatic couplers that "the risk in coupling and uncoupling was the evil sought to be remedied."

In *Minn. St. Paul & Sault Ste. Marie Rwy. Co. vs. Popplar, Admr.*, 237 U. S. Reports, page 369,

The testimony was that decedent, on giving stop signal, attempted to uncouple car; tried repeatedly by pulling coupling pin with the lifter; did not suc-

ceed; stepped between cars moving at four miles per hour and attempted to uncouple by same; killed. Conductor testified that coupling worked with difficulty.

The Court says, in its opinion:

> "Without going into evidence in detail, it is sufficient to say we find no ground for reversal on the ground that there was no evidence to go to the jury upon the question whether in fact the appliance complained of was defective. Where the power of this Court to review the judgment is controlled by paragraph 237, Judicial Code, questions non-Federal in character may not be considered, nor can this Court pass on whether a rule of the carrier was or was not disobeyed in a case dependent upon the Safety Appliance Act."

In *Seaboard Air Line vs. Tilghman*, 237 U. S. Reports, page 499, the Court held:

> "The Federal Employers' Liability Act rejects the common law rule that contributory negligence is a complete defense and adopts the more reasonable rule that the damages should be diminished in proportion to the amount of negligence attributable to the injured employee."

It is respectfully submitted that this action was one under the facts and law properly submitted to the determination of a jury and the judgment should be affirmed.

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